

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-1359

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS MORALES,

Defendant-Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

APPELLANT'S APPENDIX

Harold O N Frankel

~~HARRY G. FRANKEL~~

Attorney for Defendant-Appellant

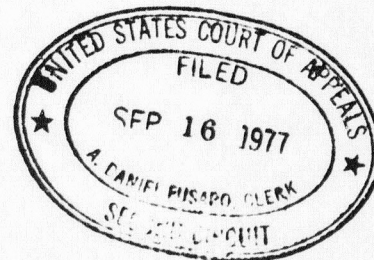
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DOCKET ENTRIES

5-3-77 Filed Indictment.....Knapp,J.

5-12-77 Deft. (atty. Arnold E. Wallach present) pleads not guilty.
R.O.R. Case assigned to Stewart,J. for all purposes
.....Knapp,J.

5-12-77 Filed notice of appearance of Arnold E. Wallach as attorney
for deft.

5-20-77 Pre-trial conference held & concluded...STEWART,J. 3 5-20-77 E 1
5-20-77

6-3-77 Filed Deft. Notice of Motion & Affidvt. for an order dismissing the indictment
Ret. By the Court.

6-3-77 Filed Deft. Memo of Law.

6-23-77 Filed Govt's memorandum of law in opposition to deft's motion
to dismiss the indictment

6-27-77 Filed deft's affid in reply to the answering memorandum submitted
by the Govt. & also to advance further grounds for granting
the relief sought for in this motion, namely a dismissal of
the indictment

7-29-77 Filed memorandum of law in opposition to deft's request for disclosure
of electronic surveillance

7-5-77 Filed memo end on motion fld 5-3-77- ZDeft's motions are denied, including
his double jeopardy claim raised in his June 27, 1977 affid
so ordered Stewart,J. M/N

7-11-77 TRIal began Jury 2 alts.

7-12-77 TRIal concluded. DEft GUILTY as charged Jury polled. Sent adj to
8-16-77 at 9:30 A.M. DEft ROR until 9 A.M. on July 13, 1977 to
post bail of \$10,000 PRB SECured by \$2,000 cash....STEWART,J.

7-13-77 Filed Govt's proposed examination of prospective jurors on voir dire

7-13-77 Filed Govt's trial memorandum

7-13-77 Filed Govt's supplemental request to charge

7-13-77 Filed Govt's requests to charge

7-13-77 Filed Transcript of proceedings, dated MAY 20, 1977

7-15-77 Filed appearance bond on the amount of \$2,000 dated 7-13-77

7-15-77 Filed ORDER -The Court extends deft's time to post Two Thousand
(\$2,000) until 4:30 PM on Wed. July 13, 1977 SoOrdered STEWART,J. M/N

8-24-77 Filed JUDGMENT & COMMITMENT DEft (atty Arnold wallach present)
The deft is hereby committed to the custody of the Atty General
or his authorized representative for imprisonment for a period
of SIX (6) MONTHS . DEft to surrender for service of sentence
at 10:00 A.M. on August 30, 1977 in room 506....STEWART,J.
copies issued

8-26-77 Filed notice of appeal from the Judgment of conviction entered
on the 24th day of August 1977.(copy mailed to defts atty & U.S. Atty)

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :
- v - : INDICTMENT
LOUIS MORALES, : 77 Cr.
Defendant. :
-----X

The Grand Jury charges:

On or about April 28, 1977, in the Southern District of New York, LOUIS MORALES, the defendant, having been ordered to testify by the Honorable Lloyd F. MacMahon, United States District Judge, pursuant to the lawful order of the Honorable Inzer B. Wyatt, United States District Judge, granting the defendant, LOUIS MORALES, testimonial immunity and commanding him to testify before a Grand Jury for the Southern District of New York "as to all matters about which he may be interrogated before said grand jury," unlawfully, knowingly, wilfully and contumaciously did disobey and resist said lawful order by refusing to answer the following questions posed before the Grand Jury:

1. Do you know a man by the name of Vincent Cafaro?
2. Have you ever worked in a policy operation with Vincent Cafaro?
3. Have you ever discussed a policy gambling operation supervised by Anthony Salerno at 2226 First Avenue?

(Title 18, United States Code, Section 401(3))

FOREMAN

ROBERT B. FISKE, JR.
United States Code

2A

A

NOTICE OF MOTION WITH AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

LOUIS MORALES,

Defendant

77 Cr. 335

(CES)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of
ARNOLD E. WALLACH, sworn to the 3 day of June, 1977, the
indictment herein, and upon all the proceedings heretofore had
herein, a motion will be made in the above designated Court,
before the Honorable Charles E. Stewart, a Justice thereof,
at such time and place as the Court may determine, at the
Courthouse thereof, Foley Square, Borough of Manhattan, City and
State of New York, for an order dismissing the indictment herein,
together with such different relief as to this Court may seem
just and proper.

Dated: New York, New York
June 3, 1977

Yours, etc.

ARNOLD E. WALLACH
Attorney for Defendant
Office & P. O. Address
11 Park Place
New York, N.Y. 10007
(212) 227-0959

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

77 Cr. 335
(CES)

- against -

AFFIDAVIT

LOUIS MORALES,

Defendant

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ARNOLD E. WALLACH, being duly sworn, deposes and says that:

1. I am the attorney for the above named defendant. The defendant has been indicted for criminal contempt under 18 U.S.C. 401(3). The indictment contains one (1) count and alleges that the defendant refused to testify before a grand jury after being given immunity and after having been ordered to do so by Judge MacMahon. The indictment further alleges that the statutory predicate is 18 U.S.C. 401(3) which states in its relevant part that:

" Power of Court. - A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as (1)*(2)*(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command..."

It is to be noted that this Section firstly limits the jurisdiction of a Court to institute contempt proceedings and furthermore, the statute itself is designated "Power of Court".

2. This motion seeks relief by way of a dismissal of the indictment or other appropriate relief as this Court may determine and this motion is predicated upon Rule 12 of the Federal Rules of Criminal Proceedings which provides in subdivision (b) that a

defense objection or request which can be determined in advance of trial be made in advance of trial of necessity. Subdivision (1) under the particular phase of the Rule under consideration states that defenses or objections based on defects in the institution of the prosecution or alternatively as provided in subdivision (2) a defense or objection based on defects in the indictment other than it confers jurisdiction on the Court, must be made in advance of trial.

HISTORY OF THE CASE:

3. Morales, having appeared before the grand jury, raised issue as to electronic surveillance and his right of silence grounded on the Fifth Amendment to the Federal Constitution. Thereupon a hearing was had before Judge Lasker. While counsel was present at such hearing, there was no evidentiary hearing, and Judge Lasker held that the government's response to the electronics surveillance issue was adequate and that the electronic surveillance warrant under consideration was facially valid. Thereupon Judge Lasker in a written direction or order and decision stated in part that:

"Accordingly the witness is directed to testify before the grand jury or be held in civil contempt until such time as he does testify..."

4. Thereupon at a later date after the defendant again refused to testify, an application was made to Judge MacMahon for a commitment to hold him for civil contempt. The defendant having refused to testify went to jail as a contemnor under 28 U.S.C. 1826 for civil contempt.

5. After a brief period of incarceration he was released.

6. The indictment followed.

THE ISSUE:

WAS THE GRAND JURY ENTITLED TO INDICT
THE DEFENDANT.

7. Rule 42(b) of the Federal Rules of Criminal Procedure provides that:

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this Rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the Court for that purpose by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides... Upon a verdict or finding of guilt the Court shall enter an order fixing the punishment."

8. In two appearances before the grand jury the U.S. Attorney advised the defendant as follows:

"If you fail to do so, you could be indicted for criminal contempt, or, you could be remanded into the custody of the Marshals for civil contempt." (Grand jury minutes of March 24, 1977 at page 22).

9. On April 28, 1977 and at page 4 of the minutes of the grand jury of even date the defendant was told the following by the government attorney:

"Q. You're either to testify pursuant to Judge Wyatt's order of immunity or the Government will make an application to have you held in civil contempt... I also wish to warn you that in addition to subjecting yourself to civil contempt, you might also be indicted for criminal contempt. Do you understand that?"

"A. I do."

6A

"Q. If you are cited for civil contempt you will remain in jail for the life of this grand jury which expires on March 14, 1978, subject to three six months extensions..."

10. It is respectfully submitted that the aforementioned manifestations of "advice" given to the defendant by the U.S. Attorney was confusing and spelled out an option to the defendant of which route he could take to go to jail. Namely, by way of civil contempt or alternatively, criminal contempt.

11. The defendant apparently chose civil contempt and his commitment expired. Now the indictment followed and he faces criminal contempt.

12. It is submitted that the grand jury cannot indict the defendant for the ensuing reasons.

13. No judge involved in this case, namely Judges Lasker and MacMahon availed the Court of the preogative given under Rule 42 (b) Federal Rules of Criminal Procedure.

14. It would thus appear that this rule is ancillary to the Judge's office if not the jurisdiction of the Court, to mandate or compel obedience to the Court and its process or orders and to subject one to the lawful authority of the Court.

15. The judicial power of this Court is founded in Article 3 of the United States Constitution. While Article 2 of the Constitution vests the Executive power in the President of the United States and this would include the Justice Department, Article 1 is the font of the legislative jurisdiction. However, in this simple case there appears to be a problem of overlapping jurisdiction, federalism and a separation of powers. It would

seem that the authority of the Court to vindicate its jurisdiction and authority, is vested in the Courts and not in Congress. It is suggested that Congress in enacting 18 U.S.C. 401 enacted a statute which neither added to the Court's jurisdiction, contradicted the Court's jurisdiction, supplanted the Court's jurisdiction to hold one in contempt, nor did it substitute for the direction in Rule 42 of the Federal Rules of Criminal Procedure. We thought these problems had been repeatedly adjudicated and reviewed since 1803. See Marbury v. Madison, 5 U.S. 137 to 1976 see Buckley v. Valeo, 426 U.S. 1. Thus, under 2 U.S.C. 192 a witness before Congress who refuses to testify or produce papers, relative to the subject matter under legislative investigation, can be deemed to have committed a misdemeanor punishable by a fine of not more than \$1,000 nor less than \$100. But such a witness having thus defaulted can be prosecuted it would appear only under the procedures found in 2 U.S.C. 194 which states in part that:

"Whenever a witness summoned as mentioned in Section (Section 192 of this Title) fails to appear to testify..., or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry,... and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session a statement of the facts constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President...or Speaker... to certify, and he shall so certify, the statement of the facts aforesaid...to the appropriate United States Attorney, whose duty it shall be to bring the matter before the grand jury for its action..." (Emphasis supplied).

16. It is respectfully submitted therefore, that each respective branch of the government has the contempt power. Thus the legislative jurisdiction to prosecute for contempt is not only found in 2 U.S.C. 194 but also within the inherent jurisdiction of Congress. In Jurney v. MacCracken, 294 U.S. 125 (1935) it was held that the jurisdiction of Congress to punish for contempt was in no way supplanted by the enactment of the statutes making refusal to respond a misdemeanor. That statute it was held was enacted not because the power of Congress to punish for a past contempt was in any way endowed, but because the imprisonment was limited to a duration of the session and this was not considered sufficient punishment. The point of all of this that each branch of the government has the power to conduct a contempt proceeding. It will now be argued that since neither judge involved in this case, Judge Lasker nor MacMahon, called upon the U.S. Attorney under Rule 42 (b) to institute a contempt proceeding the grand jury itself could not institute one. In Re Grand Jury Subpoena "Custodian of Records AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO LOCAL 248," 402 F. Supp. 725 (D.C.E.D. Wisc., 1975) it was held that no indictment lies under 18 U.S.C. 401 as such because normally a grand jury cannot on its own indict one under that statute. In that case the contemnors were under a labor injunction and apparently violated that injunction. The Judge who granted the injunction was asked by a federal agency to cite the individuals for criminal contempt. The Judge in turn directed the issue to be referred to a grand jury, at page 727. The grand jury accordingly issued subpoenas for documents and commenced the investigation. The parties

moved to vacate the subpoenas. It was held that the grand jury was without jurisdiction. At page 734 it was stated in part that:

"...If matters of criminal contempt do not per se violate federal criminal law, the Government's assertion of independent grand jury jurisdiction in this case may find somewhat limited support in the oft-cited dicta that 'prosecution of criminal contempt may follow, from indictment or presentment of the grand jury.' United States v. Buckowski, 435 F. 2d 1094, 1103 (7th Cir. 1970), cert. denied 401 U.S. 911, 91 S. Ct. 874, 27 L. Ed. 2d 809 (1971)

"A presentment is the written notice made by members of the grand jury of an offense, the commission of which is within the grand jury own knowledge or observation. It is thus significant that in those cases where contempt prosecutions followed grand jury presentment, the conduct alleged to be contemptuous occurred in the presence of the grand jury. ..."

On page 735-736, it was stated in part that:

"The presentment and indictment cases seemingly hold that the presentment or indictment can be considered the constructive equivalent of an application, and, consequently, that the fact and substance of the presentment or indictment may be considered in determining the adequacy of the notice given. If the trial judge accepts the presentment or indictment - in effect as an application - and subsequently issues the appropriate order, the requirements of Rule 42(b) are met."

"Recognition of an inherent grand jury power to commence criminal contempt prosecutions would undermine the power which is properly that of the court. Criminal contempt is a sui generis proceeding to vindicate the authority of the court and the integrity of its proceedings. It is the court which is offended and not the grand jury. Rule 42(b) accordingly requires that under either method notice, the step actually initiating the prosecution must be taken by the Court. A contrary result would deprive the Court of its recognized authority to control the conduct of a criminal contempt proceeding. ..."

"...The Court having concluded that the grand jury is without independent authority to inquire sua sponte into matters of criminal contempt, it necessarily follows that the grand jury is acting in this area under the authority of Judge Warren's order of July 26, 1975. If Judge Warren's order confers the authority, it in turn must demarcate the boundaries of appropriate grand jury activity. ..." (Omitting internal citations).

17. Just what role a grand jury occupies was in the framework of federalism was recently considered in U.S. v. Chanen, 549 F. 2d 1306 (Cir. 9th, 1977) where at page 1312 it was stated in part that:

"In resolving disputes involving District Court, prosecutor and/or grand jury, some appellate courts have attempted to pigeonhole the grand jury into one of the three branches of government created by the first three Articles of the Constitution. For example it has been said that the grand jury is essentially an agency of the Court, and that it exercises its powers under the authority and supervision of the Court... On the other hand, it has been asserted that grand juries are basically law enforcement agencies and are for all practical purposes an investigative and prosecutorial arm of the Executive branch of the government... To the extent that these apparently conflicting statements reflect the view that the functions of the grand jury are intermittently related to the functions of court and prosecutor, we have no disagreement with them. ... But under the constitutional scheme, the grand jury is not and should not be captive to any one of the three branches. The grand jury is a pre-constitutional institution..., given constitutional stature by the Fifth Amendment but not relegated by the Constitution to a position within in any of the three branches of the government. The federal grand jury is a constitutional fixture in its own right..." (Internal quotations and citations omitted).

"...As a practical matter, the grand jury generally relies on the prosecutor to determine what witnesses to call. Also, in practice the prosecutor conducts the examination of the witnesses and otherwise determines what evidence to present before the grand jury..." (Internal quotations and citations omitted).

On page 1313 it was held also:

"The Court on the other hand, exercises its power to summon witnesses to attend and give testimony before the grand jury. Also, it is the Court which must compel a witness to testify if, after appearing, he refuses to do so. ..." (Omitting internal quotations and citations).

18. It is respectfully submitted that from a realistic view what happened in this case as in other cases, it was the defendant's refusal to return to the grand jury and refuse to answer questions that constituted the contempt. Not what may have transpired before the grand jury. Hence it was the Court's direction which is the gist of the charge here and there was no contempt committed actually before the grand jury. Hence it would seem that it is within the Court's province to enforce its mandate by charging the defendant with criminal contempt rather than by the United States Attorney seeking and procuring an indictment.

19. Furthermore, it is respectfully submitted that if in this case the grand jury before which the defendant appeared was the grand jury that rendered the indictment, this was highly prejudicial to the defendant and that the matter should have been given over to another grand jury if a grand jury would have the standing to charge the defendant. Furthermore, if the grand jury that handed up the indictment was not informed that the defendant was cited for civil contempt, that the defendant contends this was a highly prejudicial omission. Since the grand jury stands between the sovereign and the individual, the grand jury should have been told of this and perhaps it would not have indicted the defendant at all.

20. In U.S. v. Hinton, 543 F. 2d 1002 (ir. 2d 1976) at page 1010 it was stated in part that:

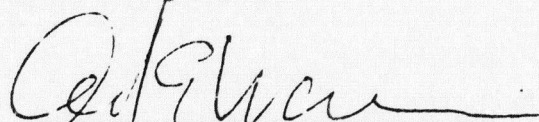
"We believe that as a matter of fundamental fairness, a Government practice of using the same grand jury that heard the immunized testimony of a witness to indict him after he testifies, charging him with criminal participation in the matters being studied by the grand jury, cannot be countenanced. The procedure is so fraught with applicable constitutional problems and with the potential for abuse that in our supervisory power over the administration of criminal justice in the district courts of this circuit..., we are compelled to conclude that the procedure the Government adopted here falls outside the bounds of permissible prosecutorial conduct. Accordingly we reverse the conviction of appellant Hinton and instruct that the indictment be dismissed as to her." (Omitting internal citations)."

21. No prior application has been made for the relief sought for herein to this or any other Court.

WHEREFORE, it is respectfully requested that the relief set forth in the annexed Notice of Motion be granted.

Sworn to before me this

3 day of June, 1977


ARNOLD E. WALLACH

New York
County
County
1977, 19 79

13A

GOVERNMENT'S ANSWER

Statement of Facts

By subpoena dated February 10, 1977 defendant Louis Morales was commanded to appear and testify on February 24, 1977 before a Grand jury sitting in the Southern District of New York. Defendant Morales appeared on that date, and was informed that the Government intended to obtain a Court Order giving Morales testimonial immunity.

On March 24, 1977 defendant again appeared before the grand jury, asserted his Fifth Amendment right against self-incrimination, and read a statement asking the United States Attorney to tell him whether any questions to be asked of him were based in any way upon evidence acquired through any form of electronic surveillance.

Earlier on that same day, upon application of the United States Attorney, Judge Inzer B. Wyatt had signed an order pursuant to 18 U.S.C. § 6002 granting defendant testimonial or use immunity and ordering him to "give testimony which he refuses to give on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated" before the Grand Jury. Upon defendant's assertion that day of a privilege against self-incrimination the Assistant United States Attorney informed defendant Morales of Judge Wyatt's order, and explained the penalties for failure to testify as ordered:

Now, Mr. Morales, the government is now under an obligation to respond to your questions formally under a District Court Judge as to whether there's been any electronic surveillance. We will do so.

However, I wish to stress that in any event that question is determined to the satisfaction of the Judge, and you come back before this Grand Jury, you must -- you will be under Court order to testify.

If you fail to do so, you could be indicted for criminal contempt, or, you could be remanded into the custody of the Marshals for civil contempt.

If you are remanded into custody for civil contempt, you will stay in jail for the life of this Grand Jury or until you decide to testify.

If you are indicted for criminal contempt, you could be severely penalized for that as well.

Do you understand that?

A. I do.

(Grand Jury minutes of March 24, 1977, at 22.)

Defendant's objections to testifying on the ground that the questions to be propounded were based on illegal electronic surveillance were considered by Judge Morris E. Lasker, who issued a memorandum order dated April 22, 1977, directing defendant to testify before the Grand Jury or be held in civil contempt until such time as he does testify. On April 28, 1977 defendant appeared before the Grand Jury

refused to answer several questions asked him on the ground that an answer would tend to incriminate him. The consequences of such contumacious refusal to testify in the face of the orders of Judges Wyatt and Lasker were again explained to defendant:

Q. You're either to testify pursuant Judge Wyatt's order of immunity or the Government will make an application to have you held in civil contempt pursuant to Title 18, United States Code, Section 1826A. I also wish to warn you that in addition to subjecting yourself to civil contempt, you might also be indicted for criminal contempt. Do you understand that?

A. I do.

Q. If you're cited for civil contempt, you will remain in jail for the life of this Grand Jury which expires on March 14, 1978, subject to three six month extensions.

(Grand Jury Minutes of April 28, 1977, at 4.)

Shortly thereafter, on the same day, the Government applied to the Court for an order holding defendant in contempt of court if he continued to refuse to answer questions asked him before the Grand Jury. Defendant's counsel then informed the Court that defendant would not testify, and the Court questioned the defendant. The Court found defendant Morales to be in contempt, and committed him to the custody of the Attorney General of the United States until the expiration of the term of the Grand Jury or until he purged himself of contempt by testifying before the Grand Jury.

The next day (April 29, 1977) defendant Morales surrendered to begin serving his term at the Metropolitan Correctional Center. Four days later, on May 3, 1977, at the Government's request, Judge Whitman Knapp signed an order releasing defendant forthwith from the Metropolitan Correctional Center because the Grand Jury investigation was concluded.

The Grand Jury indicted Morales on May 3, 1977 under 18 U.S.C. § 401(3) for unlawfully, knowingly, wilfully, and contumaciously disobeying and resisting the lawful orders of United States District Court Judges Wyatt and MacMahon by refusing to answer before the Grand Jury the three questions specified in the indictment.

ARGUMENT

POINT I

An 18 U.S.C. § 401(3) CRIMINAL CONTEMPT PROCEEDING MAY BE COMMENCED BY INDICTMENT SO LONG AS THE NOTICE AND HEARING REQUIREMENTS OF RULE 42(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE ARE SATISFIED

Defendant's argument that the Grand Jury is not constitutionally or statutorily able to indict a person for criminal contempt under 18 U.S.C. § 401(3) is not supported by a single citation to any decision dismissing a criminal contempt indictment, and ignores well established case law upholding the commencement by indictment of an 18 U.S.C. § 401(3) criminal contempt proceeding. FRCP Rule 42(b) provides for certain notice and hearing requirements which

a criminal contempt proceeding must satisfy, but neither requires nor prohibits the initiation of such a contempt proceeding by indictment:

(b) Disposition Upon Notice and Hearing.
A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charges involve disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The United States Supreme Court, in reviewing a criminal contempt proceeding brought pursuant to 18 U.S.C. §401(3) and FRCP Rule 42(b), stated that "criminal contempts, although subject, as we have held, to sentences of imprisonment exceeding one year, need not be prosecuted by indictment under the Fifth Amendment." Green v. United States, 356 U. S. 165, 187 (1957). This language has been construed as approving prosecution of criminal contempt under 18 U.S.C. § 401 by indictment. Steinert v. United States District Court, 543 F.2d 69, 70-71 (9th Cir. 1976); United States

6-2961

v. Leyva, 513 F.2d 774, 778 (5th Cir. 1975). Initiating a criminal contempt proceeding by indictment rather than by notice and order to show cause ordinarily provides a defendant with greater due process safeguards than FRCP Rule 42(b)'s minimal requirements. United States v. Eichhorst, 544 F.2d 1383, 1387-88 (7th Cir. 1976); United States v. Bukowski, 435 F.2d 1094, 1103 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971).

B -7-

The reading or describing in Court of a Grand Jury indictment or presentment which sets forth the essential facts of the criminal contempt, and the scheduling of a trial date in order to provide defendant adequate preparation time, fully complies with the requirements of FRCP Rule 42(b) and 18 U.S.C. §401(3). United States v. Mensik, 440 F.2d 1232, 1234 (4th Cir. 1971) (per curiam); United States v. Sternman, 415 F.2d 1165, 1168 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970); United States v. DeSimone, 267 F.2d 741, 743-44 (2d Cir.), vacated as moot, 361 U.S. 125 (1959) (per curiam).^{*} Defendant rightly does not claim that the indictment before this Court does not meet the due process requirements of FRCP-Rule 42(b). The indictment specifies the lawful orders which defendant disobeyed and resisted, describes with exactness how he violated those orders by refusing to answer three

^{*}Defendant places primary reliance upon In re Amalgamated Meat Cutters & Butcher Workmen, 402 F. Supp. 725 (E.D. Wis. 1975), in which the matter before the Court was a motion to quash certain portions of a subpoena duces tecum issued by a grand jury. The District Court held that the determination of the relevancy and materiality of the subpoenaed documents should be made by the District Court Judge who ordered that the matter of possible criminal contempt by certain union members be submitted, at the union members' request, to the grand jury. In a related appeal arising out of the District Court's ultimate finding of contempt the United States Court of Appeals for the Seventh Circuit had before it the issue of whether appellant union members' motion to dismiss the contempt proceedings initiated by grand jury indictment should have been granted. United States v. Eichhorst, supra. In sustaining the initiation of that particular criminal contempt proceeding by indictment, the Seventh Circuit necessarily overruled the dicta reasoning of In re Amalgamated Meat Cutters & Butcher Workmen concerning the initiation of a criminal contempt proceeding by indictment. 544 F.2d at 1388. Another Circuit Court has since expressly disapproved the In re Amalgamated Meat Cutters & Butcher Workmen decision. Steinert v. United States District Court, supra, at 71 n. 1.

questions posed by the Grand Jury, and cites the criminal contempt statute (18 U.S.C. § 401(3)) which defendant allegedly violated. Defendant has been arraigned and, therefore, has been informed by the Court of the charges against him. A trial date has been set by the Court for July 11, 1977, giving defendant adequate time to prepare his defense. Therefore, this criminal contempt proceeding, initiated by indictment, satisfies all the requirements of 18 U.S.C. §401(3) and F.R.C.P. Rule 42(b).

POINT II

THERE WERE NO IRREGULARITIES
IN OBTAINING THE INDICTMENT
WHICH WARRANT ITS DISMISSAL

Defendant Morales claims that his indictment by the Grand Jury before which he refused to testify would be prejudicial, and suggests that the indictment should be dismissed under United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976). The Hinton decision is completely inapposite because there the defendant had testified before the Grand Jury under a grant of use immunity, and was indicted by that same Grand Jury for violations of federal narcotics laws arising out of the matters being studied by the Grand Jury and concerning which the immunized testimony was given. Criminal contempt proceedings, on the other hand,

which arise out of a witness's refusal to answer questions posed by the Grand Jury are frequently initiated by an indictment or presentment voted by the Grand Jury before which the defendant appeared and refused to testify. United States v. Leyva, supra, at 776; United States v. Steinman, supra, at 1167; United States v. DeSimone, supra, at 743; Carlson v. United States, 209 F. 2d 209, 218 (1st Cir. 1954).

Likewise, defendant's claim that a Grand Jury should be informed of defendant's civil contempt before deliberating as to a criminal contempt indictment is without merit. Criminal contempt is completely independent of civil contempt and, unlike civil contempt, is designed for purposes of punishment and deterrence. Shillitani v. United States, 384 U.S. 364, 371 (1966); Yates v. United States, 355 U.S. 66, 72 (1957). If at all relevant, the fact of defendant's continued refusal to testify despite being held in civil contempt would have provided an additional compelling reason for indicting defendant for criminal contempt. Yates v. United States, supra, at 74-75; United States v. United Mine Workers, 330 U.S. 258, 298-300 (1947).

Finally, defendant's assertion that the Assistant United States Attorney gave defendant the option of being held in civil or criminal contempt, and that the defendant "chose" civil contempt, belies the record in this case and the Grand Jury minutes set forth in the Statement of Facts supra. Clearly, defendant was informed that his continued refusal to testify would expose him to the penalties of both civil and criminal contempt:

If you are remanded into custody for civil contempt, you will stay in jail for the life of this Grand Jury or until you decide to testify.

If you are indicted for criminal contempt, you could be severely penalized for that as well. (Emphasis added.)

(Grand Jury minutes of March 24, 1977, at 22.)

You're either to testify pursuant to Judge Wyatt's order of immunity or the Government will make an application to have you held in civil contempt pursuant to Title 28, United States Code, Section 1826A. I also wish to warn you that in addition to subjecting yourself to civil contempt, you might also be indicted for criminal contempt. Do you understand that? (Emphasis added.)

(Grand Jury minutes of April 28, 1977, at 4.)

Defendant was held in civil contempt, not at his option, but upon application to the Court by the Government for such an order consistent with the United States Supreme Court's suggestion that civil contempt be utilized first before resorting to criminal contempt sanctions. Yates v. United States, supra; United States v. United Mine Workers, supra.

CONCLUSION

For the foregoing reason defendant's motion should be denied in all respects.

Respectfully submitted,

ROBERT B. FISKE, Jr.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

RICHARD J. MCCARTHY
Assistant United States Attorney

-Of Counsel-

ANSWERING AFFIDAVIT OF ARNOLD E. WALLACH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

77 Cr. 335
(CES)

- against -

AFFIDAVIT

LOUIS MORALES,

Defendant

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ARNOLD E. WALLACH, being duly sworn, deposes and
says that:

1. I am the attorney for the above named defendant.
I am making and submitting this affidavit in reply to the answering
memorandum of law submitted by the government and also to advance
further grounds for granting the relief sought for in this motion,
namely a dismissal of the indictment.

2. A reading of the indictment indicates that the
basis for the charge was the defendant's refusal to comply with the
Court's direction to respond to questioning before the grand jury.
For this he was originally held in civil contempt.

3. While civil contempt is deemed "civil" because the
contemnor can purge himself of the contempt, and seek relief from
jail, it is suggested that the issue remains namely whether "civil
contempt" is distinguishable from criminal contempt from the
vantage of the 5th Amendment prohibition against double jeopardy
or conjunctively or alternatively, from the due process mandate of
the 5th Amendment.

4. By the single refusal of the defendant he now
faces punishment a second time. If the government objects to the

meaning of the expression "punishment" because the defendant was initially held for civil contempt, it is submitted that this fine distinction cannot be understood in practice and meaningful impact upon the defendant or any other person circumstanced as the defendant was and is. From the view of such a person punishment was visited upon such person when he was jailed for civil contempt. It is submitted that civil contempt has all the indicia of a crime. Thus the contemnor has a right to counsel. A problem could arise if the contemnor cannot afford counsel and whether counsel could be assigned. He can defend the action, he can also refuse to testify and can remain silent in the face of the charge of civil contempt. Lastly, he goes to jail. It is suggested that form does not survive substance when the consequences are drastic and/or penal. See Person v. The Association of the Bar of the City of New York, et al., Court of Appeals, Second Circuit, April 29, 1977, slip opinion 3261, it being stated on page 3266 in part that:

"State disciplinary and disbarment proceedings have been held comparable to criminal proceedings ..."

That case also cited Erdmann v. Stevens, 458 F. 2d 1205, (Cir. 2d) cert. den. 409 U.S. 88 (1972) which held that a state disbarment proceeding is quasi-criminal. It is submitted if the loss of a license to earn a livelihood is considered quasi-criminal or is comparable to a criminal action, certainly a civil contempt proceeding is likewise comparable to a criminal action or is quasi-criminal.

5. If the government wishes to avoid a claim of double jeopardy or a denial of due process (5th Amendment to the Federal Constitution) as is the case here, the government could have had the judges involved in this case decide each type of contempt simultaneously or in one proceeding. In other words, the two types of contempt could have been consolidated in one proceeding. It is put that the holding in Ashe v. Swenson, 397 U.S. 436, concurring opinion of Mr. Justice Brennan would be applicable. Thus, the indictment herein clearly charged the defendant with all the elements that already transpired and were had in the civil contempt proceeding the consequence of a defendant already having gone to jail for the single refusal before the single judge constituting both types of contempt.

6. In other words, it is submitted that the defendant has and will suffer double punishment a matter within the 5th Amendment prohibition of double jeopardy and will also have been tried twice. See U.S. v. Sperling, U.S. Court of Appeals, 2nd Circuit, June 13, 1977, slip opinion 4139 at pages 4142 it being stated in part that:

"We start with the proposition that the double jeopardy clause...was designed as much to prevent a criminal from being twice punished for the same offense as from being twice tried... It prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense..." (Omitting internal quotations and citations).

See also Jeffers v. U.S., 45 U.S. Law Week, 4691.

7. In Brown v. Ohio, 45 Law Week 4697, the United States Supreme Court reviewed favorably for the petitioner in that case, the issues of double jeopardy and the case where one act can violate two different statutes. On pages 4698 it was stated in part that:

"...The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishment; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial."

It was further held that double jeopardy bars an accused against the successive prosecution for the same offense after a prior conviction. Therefore what can be left is that the refusal attributed to the defendant in this case may have involved or violated two statutes; the statute governing "civil contempt" and 18 U.S.C. 401 or Rule 42 of the Federal Rules of Criminal Procedure. The test however whether a criminal act violating two separate statutes can result in consecutive or multiple punishment is that where proof of the facts of one offense is co-extensive but does not exceed the proof as to the other statute. Here, it was the one refusal of the defendant that resulted in the defendant being held for civil contempt. It will be the same proof under this indictment.

8. There are other ramifications involved. Thus as in double jeopardy cases, the defendant has already gone through one hearing before a judge; he had to engage counsel; and, of course, he had to undergo jail whether it be called a civil commitment or a criminal commitment. Now the defendant again had

to engage counsel, faces a trial, and has to endure the consequences of losing and suffering a fine or a jail term.

9. It can be inferred that the government was dissatisfied with the short jail term the defendant endured for "civil contempt". However, that is a matter that Congress decided. It is Congress to determine the length of the jail sentence and not the government.

10. This brings us therefore to the next issue namely the opposition of the government to the relief by way of a dismissal of the indictment. The government achieved an indictment in this case from the grand jury rather than proceeding to the other two judges involved in this case, namely, Judges Lasker and MacMahon. Neither Judge recommended the defendant be charged with criminal contempt under Rule 42 of the Federal Rules of Criminal Procedure. The government of course then arranged for a grand jury indictment. If the defendant stood in jail for a longer period of time and the duration satisfied the government then perhaps the government would not have arranged for an indictment. But the government apparently was dissatisfied with the commitment previously suffered by the defendant.

11. On page 8 of the government's memorandum, in the footnote as well as on pages 7, the government cites U.S. v. Eichorst, 544 F. 2d 1383(Cir. 7th). It seems the government argued that this case overrules the case relied upon by the defendant namely In Re Amalgamated Meat Cutters and Butcher Workmen, 402 F. Supp. 725. It is difficult to understand how that case can be of any comfort to the government. Firstly that

case dealt with the sufficiency of an indictment for contempt, the dispute arising from whether proper notice was given to the defendants or whether the indictment was sufficient. No such claim is made in this case. But most telling is footnote 4 on page 1388 of 544 F. 2d stating that:

"Since appellants here did not object to the use of the grand jury, and in fact appeared to have been involved in requesting it, ..."

So also the government's reliance on U.S. v. DeSimone, 267 F. 2d 741 (Cir. 2d, 1959) is misplaced. Firstly, the defendant was not indicted by the grand jury, the grand jury merely issuing a presentment. Secondly, as was noted on page 713:

"Appellants first contention is that the contempt proceeding should have been initiated by an indictment or information...as in all federal criminal prosecutions, instead of a Grand Jury presentment for contempt. ..."

The whole issue in this application is that the defendant should not have been indicted by the grand jury but that the government should have attempted to procure an order to show cause from the relevant Judge under Rule 42. The balance of the opinion in DeSimone dealt with the defendant's right to a jury trial, proper notice and the contempt proceeding, the question of sentencing. Those issues are not relevant at this phase of the action.

Morales is not arguing that the indictment did not give him sufficient notice. Morales has taken the position contrary to the position in DeSimone that the grand jury should not have indicted him. Counsel cites DeSimone on page 743 where it was stated that:

"...But criminal contempt are not considered crimes in the Constitutional sense, being governed by Fed. R. Crim. P. 42... Rule 42 does not call for an indictment or information..."

12. The government in citing U.S. v. Mensik, 440 F. 2d 1232 (Cir. 4th, 1971) is not persuasive. On page 1234 in a single short paragraph referring to no authority, the Court merely held that the defendant's contention that the indictment violated Rule 42(b) was "without merit". The Court acknowledged that an indictment was not necessary to institute a criminal contempt action holding it was "permissible so long as the notice requirements of Rule 42(b) are satisfied." Painfully the deponent reiterates that this motion is not based on any "notice requirement". It is based on the argument that the defendant should not have been indicted at all. There is no question before this Court that the defendant doesn't know what this action is about.

13. Deponent also asks this Court to consider the aforementioned arguments applicable to the government's reliance on U.S. v. Sternman, 415 F. 2d 1165 on page 8 of the government's memorandum of law.

14. Nor does U.S. v. Leyva, 513 F. 2d 774 (Cir. 5th, 1975) referred to by the government on pages 6 and 7 of its brief settle the issue. Even a casual reading of Leyva, discloses that on page 778 the Court stated:

"However, defendant did not object below to indictment, nor does he present this objection on appeal, except as it might be subsumed in his argument that civil contempt should have been considered..."

Then on page 779 it was again stated:

"...However, after indictment Leyva's motion to dismiss the indictment and supporting memorandum presented numerous grounds that failed to include this contention. It was not until the Government rested its case at trial, some six months after indictment, that this contention was raised."

15. Finally, the language in Leyva at page 778 indicates that a defendant's position is based on some rationality for it was stated in part that:

"...In fact, proceeding by indictment instead of pursuant to Rule 42(b) might be objectionable as interfering an independent body into the criminal contempt process which might interfere with or impede judicial disposition of such matters..."

16. The government relief on Steinert v. U.S.D.C., etc. 543 F. 2d 69 (Cir. 9th, 1976) on pages 6 and 8 of the government's memorandum of law. It is true that in footnote number 1 at page 71 the 9th Circuit disapproved of In Re Amalgamated Meat Cutters. It is submitted that this case is not binding in this circuit and the government has failed to show that in this circuit the defendant's contention is wrong.

17. Finally, in regard to all the matters embraced in the application and this immediate affidavit, counsel respectfully draws the attention of this Court to a ruling in Shilipani v. U.S., 384 U.S. 364 at pages 371-372, footnote 9, stating that:

"However, defendant did not object below to indictment, nor does he present this objection on appeal, except as it might be subsumed in his argument that civil contempt should have been considered..."

Then on page 779 it was again stated:

"...However, after indictment Leyva's motion to dismiss the indictment and supporting memorandum presented numerous grounds that failed to include this contention. It was not until the Government rested its case at trial, some six months after indictment, that this contention was raised."

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17. Finally, in regard to all the matters embraced in the application and this immediate affidavit, counsel respectfully draws the attention of this Court to a ruling in Shilipani v. U.S., 384 U.S. 364 at pages 371-372, footnote 9, stating that:

"This doctrine further requires that the trial judge first consider the feasibility of coercing testimony through the imposition of civil contempt. The Judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate."

It is respectfully submitted that the indictment herein does not lie because it is not the grand jury who should determine whether the government should resort to criminal sanctions.

WHEREFORE, it is respectfully requested that the relief set forth in this application be granted.

Sworn to before me this
day of June, 1977

ARNOLD E. WALLACH

TRANSCRIPT OF TRIAL RECORD

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 UNITED STATES OF AMERICA : Before:
5 vs. : HON. CHARLES E. STEWART,
6 LOUIS MORALES, : District Judge
7 Defendant. : and a Jury.
8 -----x : 77 Cr. 335

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10 New York, July 11, 12, 1972
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17 STENOGRAPHER'S MINUTES
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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3
4
5 United States of America

6 -v-

7
8 Louis Morales,

9 Defendant.

x

x

x

x 77 Cr. 335

x

x

x

11
12 New York, N. Y.

13 July 11, 1977

14 10 am

15 Room 1505

16 Before:

17 Hon. Charles E. Stewart, Jr.,
18 District Judge;
and a jury.

19 A P P E A R A N C E S:

20 Robert B. Fiske, Jr., Esq.
21 United States Attorney
22 Richard McCarthy, Esq.
Assistant U. S. Attorney,
of counsel.

23 Arnold E. Wallach, Esq.
24 Attorney for defendant.

1 THE CLERK: United States v Louis Morales.

2 THE COURT: I would like to take a couple
3 of minutes to see counsel in the robing room.

4 (Following in the robing room)

5 THE COURT: I have two or three things that
6 I just want to clear up. I believe my chambers has
7 notified you that I denied the defendant's motion, and
8 I do so now, that motion for disclosure of warrants and
9 supporting affidavits which authorized the electronic
10 surveillance.

11 I did not get any proposed voir dire from you,
12 Mr. Wallach.

13 Is there anything you would like to add to
14 what the government has proposed?

15 MR. WALLACH: It is pretty complete. The
16 only thing is that in one of the items in the question-
17 ing, your Honor, is whether or not they ever sat on the
18 grand jury. The government I think should say "includ-
19 ing this grand jury".

20 THE COURT: Yes. I do not know whether that
21 is possible, but there is no harm to that question.

22 MR. MCCARTHY: That seems to be subsumed in
23 the question already asked--if they sat on any grand
24 jury.

25 THE COURT: Well, I will make it clear.

1 Anything else, Mr. Wallach?

2 MR. WALLACH: No, nothing on the questioning
3 of the jury.

4 THE COURT: Mr. McCarthy, is the government
5 going to put on any witnesses?

6 MR. MCCARTHY: Well, for the government's direct
7 case, your Honor, would be the court order and the
8 transcripts. We would intend to have someone act as
9 a witness merely in reading the transcripts and getting
10 them into the record before the jury.

11 MR. WALLACH: When you say "read the transcripts",
12 you will have Mr. Abzug's name mentioned.

13 I have gone through this in other courts, the
14 State court, and they usually have the District Attorney
15 get up and one of them pretends to be the witness
16 or the defendant, and the other one, the prosecutor,
17 asking the questions, and they reproduce the whole
18 thing.

19 what
Is that/you intend to do?

20 MR. MCCARTHY: That is what I intend to do.

21 MR. WALLACH: I object to that, your Honor.

22 THE COURT: Why?

23 MR. WALLACH: Because I think all the grand
24 jury testimony has been reduced to writing; it could
25 be passed to the jury, and they can read it.

1 THE COURT: I do not see any objection,
2 though, to having it presented in court by witnesses
3 or by what Mr. McCarthy proposes.

4 What is the problem?

5 MR. WALLACH: Well, it dramatizes it.

6 THE COURT: I do not know that it dramatizes
7 it necessarily. If the witnesses try to dramatize
8 it I will see to it that they don't.

9 I take it you are just going to have them
10 read--

11 MR. McCARTHY: That is correct.

12 THE COURT:-- Without any emotion or without
13 any color--

14 MR. MCCARTHY: That is correct.

15 THE COURT: -- the questions and answers.

16 MR. McCARTHY: That is correct.

17 MR. WALLACH: As I said, Judge--

18 THE COURT: I think it makes it easier for
19 the jury to follow, and I do not see that there is any
20 prejudice.

21 MR. WALLACH: Your Honor, then may I also
22 ask this, if your Honor is finished--

23 THE COURT: Well, I have not finished with
24 the voir dire.

25 MR. WALLACH: Well, I did not mean to inter-

1 rupt, your Honor.

2 THE COURT: I am going to adopt, not neces-
3 sarily in the same form, the questions which Mr. Mc-
4 Carthy proposed, and I take it you have no objection
5 to any of them.

6 MR. WALLACH: No, your Honor.

7 THE COURT: In your list of names of people
8 who might be mentioned--for example, Vincent Cafaro,
9 a/k/a Fish, do you propose that I should read the
10 "a/k/a Fish"?

11 MR. McCARTHY: Well, your Honor, it appears
12 in that form in the grand jury transcript, which would
13 be read and introduced in evidence, and it may well be
14 that somebody might know him under that name.

15 THE COURT: How about the other two a/k/a's,
16 in the person of Fat Tony and Speed?

17 MR. McCARTHY: Yes.

18 THE COURT: Do you have any objection to my
19 doing that, Mr. Wallach?

20 MR. WALLACH: Yes, sir. My understanding
21 is that a pseudonym is used when identifying a par-
22 ticular witness or suspect in connection with a case,
23 but this may imply some notoriety.

24 THE COURT: But not as to the defendant ne-
25 cessarily.

1 MR. WALLACH: No.

2 THE COURT: Well, if it is in the transcript
3 it seems to me in fairness to the defendant I ought to
4 find out from the potential jurors whether or not they
5 know Fish either by that name or by his own name.

6 MR. WALLACH: Would your Honor caution them
7 that these are just ordinary nicknames and do not con-
8 note anything sinister.

9 THE COURT: Well, I will say something like
10 that, yes.

11 MR. WALLACH: I appreciate that, your Honor.

12 THE COURT: All right, now you have some-
13 thing else, Mr. Wallach?

14 MR. WALLACH: Yes, your Honor. May I have
15 marked as an exhibit, a court's exhibit, just for the
16 record, in the motions--I know I am not arguing them--

17 THE COURT: Yes.

18 MR. WALLACH: -- I did mention a claim
19 under Ashe v Swenson of double jeopardy and collateral
20 estoppel. Can I have the minutes in that proceeding
21 before Judge Russell marked as a court's exhibit or
22 for identification, because if I lose this case there
23 will be an appeal, and I understand that where we claim
24 double jeopardy and collateral estoppel the Court may
25

1 want to see the entire record. I lost the motion but
2 we all agreed that I referred to it in the motion.

3 THE COURT: Do you have any problem with
4 that, Mr. McCarthy?

5 MR. MCCARTHY: I do not see what purpose it
6 has in referring to it, but in the argument before
7 Judge MacMahon, at Judge MacMahon's suggestion it was
8 marked as an exhibit.

9 THE COURT: Well, just for completeness of
10 the record, we will mark it as Court's exhibit 1.

11 (Deemed Marked Court's exhibit 1)

12 MR. MCCARTHY: I would want it to be clearly
13 understood this is not to be used in any case in this
14 particular trial or in argument.

15 THE COURT: I understand you do not wish to
16 do so.

17 MR. WALLACH: I do not. It is a question
18 that your Honor decided and I do not intend to do so.

19 THE COURT: Very well.

20 MR. WALLACH: However, there is one thing
21 in connection with it, Judge. The essence in this
22 type of case is wilfulness, and, as I said in the
23 motion, one phase of the grand jury proceedings in
24 the grand jury when I wasn't there, Mr. Abzug said,
25

1 "You could be held for civil or criminal contempt",
2 and at a later stage Mr. McCarthy argues that Mr. Abzug
3 said "You could be held for both".

4 THE COURT: Which I understand that to be the
5 law.

6 MR. WALLACH: Your Honor, I am not arguing
7 double jeopardy. However, with regard to intent and
8 wilfulness, where the government so presents certain
9 data to a witness and confuses him, the trial jury, I
10 submit, or your Honor as the trier of the fact, would
11 consider whether there was a question of intent, be-
12 cause the witness was confused.

13 In other words, my position over here would be
14 that in one phase he was told he could be held for crim-
15 inal or civil contempt--I raised that in the motion.

16 In the next session I think he said--he indi-
17 cated both, and that is what the government is claiming,
18 since this will all be in the evidence--

19 THE COURT: Your point is that as part of
20 your defense you wish to show that he was confused be-
21 cause of--what? Because he was told--

22 MR. WALLACH: He was told at one point, in
23 effect--the lawyer would say "You have an option, civil
24 or criminal. Choose which".
25

1 How does he choose civil contempt? He did
2 not answer.

3 THE COURT: That doesn't mean he chooses civ-
4 il contempt if he chose not to answer.

5 MR. WALLACH: But the instruction given to
6 him at one phase was--

7 THE COURT: Yes, I remember it.

8 MR. WALLACH: -- "We can hold you for con-
9 tempt".

10 THE COURT: Precisely what is it you wish to
11 do with it?

12 MR. WALLACH: Well, if I can--I don't know
13 how the case is going to develop--argue before the jury
14 that he was confused because of lack of intent--that is
15 the essence of a contempt, aside from the other gen-
16 eralities.

17 MR. McCARTHY: Your Honor, we would strenuous-
18 ly oppose it.

19 THE COURT: You are suggesting that in your
20 summation you would make this argument?

21 MR. WALLACH: Yes, sir.

22 THE COURT: Yes, Mr. McCarthy.

23 MR. McCARTHY: Your Honor, I would strenuous-
24 ly object to any reference to civil contempt in whatever
25

1 context--whether what he did wilfully or knowingly,
2 was whether he understood the court's order and con-
3 sciously refused to obey it. It has nothing to do with
4 what possible penalties might follow from his actions,
5 your Honor.

6 THE COURT: As I recall, there was nothing in
7 the transcript that I saw which indicated that there was
8 a difference in the consequences of civil or criminal
9 contempt.

10 MR. WALLACH: At one session, your Honor, I
11 believe I quoted it in the motion papers, and Mr. Mc-
12 Carthy in the motion papers said at another--Mr. Abzug
13 indicated in a later session that he would be held for
14 both.

15 THE COURT: No; what I am getting at it--I
16 think my recollection is in accord with yours, but what
17 I am getting at is something different--whether or not
18 he was told civil or criminal or civil and criminal.

19 My question is, was he told the consequences
20 of civil as distinguished from criminal?

21 Was he?

22 MR. WALLACH: He was told that on the civil
23 contempt he could be held in jail as long as the grand
24 jury was--

1 THE COURT: Is it on the record?

2 MR. WALLACH: Yes, it is in the minutes.

3 Mr. Abzug explained that--I will take it out and show
4 it to you.

5 THE COURT: Well, he was told he could be put
6 in jail for either.

7 MR. McCARTHY: He was told that both penalties
8 existed. The civil penalty was explained, and the
9 criminal penalty was explained.

10 MR. WALLACH: Otherwise, Judge, this would
11 be just an inquest.

12 THE COURT: Well, why is this something that
13 should be presented to the jury? What do they have to
14 do with it?

15 MR. WALLACH: Intent, your Honor, on the
16 charge of wilfulness.

17 MR. McCARTHY: The point is--

18 THE COURT: But he was told at some point
19 that he could be charged with criminal contempt.

20 MR. WALLACH: No question about it.

21 THE COURT: And he still persisted in his
22 refusal to answer.

23 MR. WALLACH: That is right.

24 THE COURT: Certainly the fact that he was put
25

1 in jail for civil contempt has nothing to do with this
2 proceeding.
3

4 Don't you agree?

5 MR. WALLACH: No, except that my argument is--
6 that he opted--he took Mr. Abzug's option.

7 THE COURT: But the fact that he spent some
8 time in jail on a civil contempt charge is nothing that
9 the jury should know about here, and they should not
10 know about it, and I would expect you not to bring that
11 out.

12 MR. WALLACH: No, but I think one of my argu-
13 ments is that the grand jury should have been told about
14 that.

15 THE COURT: Well, I am skeptical about that,
16 but since we do not need to deal with it now until we
17 finish the trial.

18 MR. WALLACH: Very well.

19 THE COURT: All right, we will leave that
20 question and we won't discuss it before the jury until
21 we have talked about it further.

22 MR. WALLACH: No.

23 THE COURT: All right.

24 MR. WALLACH: I have another application,
25 your Honor.

47A

1 Friday I met Mr. McCarthy and I told him that
2 the defendant is going to have to decide whether to
3 take the stand or not take the stand; that option is
4 with him, not with me.

5 I have advised him of his rights. However,
6 I asked Mr. McCarthy--I said, "If he took the stand would
7 you attempt to question him in regard to the matters
8 that he already refused to answer before the grand
9 jury?" And I ask your Honor that in the event that
10 my client does decide to take the stand, that your
11 Honor cautions or restrains the prosecutor from ques-
12 tioning him as to what he refused to answer.

13 THE COURT: What about that, Mr. McCarthy?

14 MR. McCARTHY: Well, your Honor, I think it
15 is fair--it is certainly relevant to the motive and in-
16 tent of the defendant to ask him questions about his
17 activities with respect to Mr. Cafaro and Mr. Salerno.
18 That clearly goes to the credibility of the witness and
19 his motive.

20 THE COURT: How does it go to credibility?

21 MR. McCARTHY: Well, your Honor, basically the
22 witness, when he gets on the stand--I cannot anticipate
23 exactly what he is going to testify to but if he comes
24 up, as he probably will, with some explanation or at-

1 We argued about this in our trial memorandum
2 that that particular statement with respect to fear
3 is not a valid defense to not answering the question
4 and not following the Court's order--

5 THE COURT: Well, that is a question of law,
6 of course.

7 MR. McCARTHY: Right, but we have asked that
8 defense counsel be fair about the various items that we
9 have covered in the trial memorandum, which are not
10 valid legal defenses, so that he doesn't argue it or
11 introduce evidence on those points which would unfairly
12 prejudice the government's case.

13 THE COURT: Well, if he could show that he
14 had a legitimate reason, a valid reason for refusing to
15 answer because he did in fact have a reason, he did in
16 fact fear for his life and safety, and he had good
17 reason to do so, do you think that would not be a
18 defense?

19 MR. McCARTHY: That clearly is not, your
20 Honor, and I have cited a number of cases. There are
21 three elements to criminal contempt. A fear for one's
22 own personal safety or one's own family are not valid
23 legal defenses for failure to obey the Court's order.

24 MR. WALLACH: He has cited, I believe,
25

1 United States v Piemonte.

2 Is that the one, Mr. McCarthy?

3 MR. McCARTHY: There are 3 or 4 decisions,
4 your Honor, that may be found at page 6 of the govern-
5 ment's trial memorandum. Piemonte is one of them,
6 and there are a number of other decisions.

7 MR. WALLACH: Well, I can't concede anything,
8 but I have read those cases; I could tell you that they
9 went up to the United States Supreme Court. I will
10 not concede anything, but he has cited cases, and I am
11 aware of them.

12 Your Honor, just to save time, may I direct
13 your Honor's attention--

14 THE COURT: Well, if that is so, if fear for
15 his personal safety is irrelevant, then it seems to me
16 your cross examination would be irrelevant.

17 MR. McCARTHY: The point, your Honor, is that
18 if he is precluded from raising that on direct, then
19 that would not become an issue on cross, but to the
20 extent that he takes the stand on direct and goes into
21 areas that relate to any of his associations with any
22 of the people about whom the grand jury was conduct-
23 ing this investigation, that he has waived his right
24 to refuse to answer.

1 THE COURT: You are suggesting that he should
2 not be allowed to go into that on direct.

3 MR. McCARTHY: He should not be allowed to go
4 into that on direct, but if he does--

5 THE COURT: Then you should have the right
6 to cross examine.

7 MR. McCARTHY: Yes. I do not know what
8 other matters he may go into in direct, but to the extent
9 that anything has to do with his associations.

10 THE COURT: I think it is a little hard for
11 us, Mr. Wallach, to know just what Mr. McCarthy can or
12 cannot do on cross until we have heard the direct--
13 unless you want to give us an offer of proof.

14 MR. WALLACH: May I say that I discussed this
15 with my client, and he hasn't fully made up his mind.

16 THE COURT: All right.

17 MR. WALLACH: I am not trying to be quixotic
18 about this thing; I am trying to save time.

19 Your Honor, may I say something?

20 THE COURT: Yes.

21 MR. WALLACH: Referring to what we were former-
22 ly speaking about a few minutes ago, in the minutes of
23 the grand jury dated February 24th, on page 22--I think
24 it is of March 17th, on page 22 Mr. Abzug was instruct-
25

1 ing him--not to take anything out of context, I do not
2 think anything else was said on that page in this area.

3 It says over here, on lines 12 to 13:

4 "If you fail to do so"--in other words, fail
5 to respond--"you could be indicted for criminal con-
6 tempt, or you could be remanded into the custody of
7 the marshals for civil contempt. If you are remanded
8 into custody for civil contempt, you will stay in jail
9 for the life of this grand jury or until you decide to
10 testify.

11 "If you are indicted for criminal contempt,
12 you could be severely penalized as well."

13 That is one phase. However, I want to be
14 very candid and say there was another session, I believe
15 on April 20th--

16 Am I correct, Mr. McCarthy?

17 MR. McCARTHY: That should be April 28th.

18 MR. WALLACH: April 28th, that is right.

19 And there again, I believe on page 4--

20 THE COURT: Yes, I see it. It seems to me,
21 of course, page 4 makes it crystal clear, and I don't
22 think Mr. Abzug at the earlier hearing excluded the
23 possibility that it could be both.

24 MR. McCARTHY: The point also, your Honor, is--
25

1 THE COURT: He said there were two ways he
2 could be proceeded against. He didn't say that they
3 couldn't both be used. Then he cleared that up after-
4 wards, any ambuigity, which I do not see later on.

5 MR. WALLACH: It is a question of the state
6 of mind of the defendant, Judge. He had no lawyer--

7 THE COURT: He had a lawyer at this time.

8 MR. WALLACH: I was waiting outside. Frank-
9 ly, he did not tell me these things--I didn't get these
10 minutes then and there. I told him he could go to
11 jail--

12 MR. McCARTHY: The point, your Honor, is that
13 the defendant was not directed to testify until Judge
14 Wyatt ordered him, which was on the 24th.

15 THE COURT: After the session.

16 MR. McCARTHY: If it was after the 17th it
17 would be after the session, but more importantly the
18 question that was decided by Judge Lasker was after
19 that, and it wasn't until the 28th that we had the
20 session where all possible defenses are exhausted and
21 the defendant has to testify or face the consequences.

22 That is really the only relevant session
23 here, your Honor.

24 THE COURT: Yes, I think so. And, in any
25

1 event, I do not see that there was any misleading,
2 deliberate or otherwise, by Mr. Abzug in the earlier
3 session; but I will take a look at that case that you
4 are suggesting.

5 MR. WALLACH: I just want to stress another
6 question--it is not a question of what the law is; it
7 is a question if he were confused or came to the con-
8 clusion he would not--there would not be wilfulness or
9 intent.

10 THE COURT: Yes, I understand your point, but
11 I do not think the record supports your point.

12 All right; anything else that we ought to talk
13 about now?

14 MR. WALLACH: Well, I do not want to beat a
15 dead horse, but I at no time suggested that we would
16 waive a jury, but I did make a suggestion to your Honor,
17 or just brought it up to your Honor--I know your Honor
18 is aware of it--this is a peculiar time. On the date
19 that he was arraigned I discussed the sentence. If
20 your Honor has in mind to sentence this man rather than
21 fine him for over six months, we are entitled to a jury
22 trial. Your Honor I know recognizes, has in mind to
23 sentence him for shorter than six months, then we are
24 not entitled to a jury trial. This is a tough case.

1 THE COURT: Well, I do not see how I can
2 answer your question at this point, Mr. Wallach. You
3 are in effect asking me to indicate whether or not I
4 propose to sentence him for longer than six months or
5 for less than six months. I do not know that I can
6 answer that question.

7 MR. WALLACH: I realize that. If this were
8 done by order to show cause under the rules, a judge
9 then and there can give us a day's notice to conduct the
10 trial, and it has been my experience where there is no
11 jury in the case, but here they have an indictment which
12 I find is quite extraordinary, and it places us all in
13 this position.

14 MR. McCARTHY: Whether you proceed by in-
15 dictment or order to show cause, if the government
16 wishes to insist upon a jury trial because it wants to
17 have the possibility of a sentence in excess of six
18 months, then it certainly can happen in either event.

19 MR. WALLACH: Mr. McCarthy, I submit that
20 the government or the defense have no standing for
21 that; that is course that they determined. A few
22 weeks ago Judge Ward during a trial cited two people
23 for criminal contempt and gave them the usual notice--
24 a day or two.

1 THE COURT: That was contempt in the court
2 room.

3 MR. WALLACH: Well, they were called by the
4 government, and they claimed the Fifth.

5 MR. McCARTHY: The point is you have to de-
6 termine whether the defendant is guilty or not before
7 you reach the sentence.

8 THE COURT: I do not see how I can help you
9 at this point.

10 MR. WALLACH: Actually the defendant is the
11 one--usually the defendant says "I want a jury trial."

12 THE COURT: Yes.

13 MR. WALLACH: If he will not get more than
14 five months--I want to be candid with everybody.

15 THE COURT: All right. In selecting the
16 jury, I am not sure whether--Mr. Wallach did go through
17 one criminal trial with me not too long ago. My
18 practice, Mr. McCarthy, is to call for 32 people, and
19 I will direct my voir dire to those 32, and that pro-
20 vides for 10 and 6 peremptories, and replace those 32,
21 any one or more of them as we need to, as we go along;
22 and as they are replaced, if one is replaced the replace-
23 ment will keep the same number, and then ultimately
24 when we have been through the voir dire and the challenges

1 are being exercised as to the first 12, if there is
2 somebody challenged, then number 13 takes that person's
3 place, and so on, so that you will know who is coming
4 up next.

5 Do you follow me?

6 MR. McCARTHY: I think I do, your Honor.

7 THE COURT: All right. I do not think I
8 explained it very well, but I think Mr. Rakoff can help
9 you and you can see how that works. Perhaps that is
10 the best way to explain it.

11 All right, if there is nothing else--

12 MR. McCARTHY: I want to put on the record
13 that the defendant himself had the opportunity to be
14 here, and that was waived.

15 MR. WALLACH: No question about it. I will
16 put it on the record that we waive it.

17 May we have a five-minute recess?

18 THE COURT: Yes.

19 (A short recess)

20 (Following in open court; prospective
21 jurors in the court room).

22 THE CLERK: United States of America v
23 Louis Morales. Is the government ready?

24 MR. McCARTHY: The government is ready.

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1 THE CLERK: Defendant ready?

2 MR. WALLACH: Defendant ready.

3 (Whereupon 32 names of jurors were called
4 by the clerk of the court)

5 THE COURT: Good morning, ladies and gentle-
6 ment. My name is Judge Stewart, and we are here this
7 morning for the purpose of selecting a jury in a criminal
8 case.

9 We are about to begin the actual process of
10 selecting the 12 jurors and the two alternates who will
11 try the case.

12 I am going to address a number of questions
13 now to the 32 jurors who have been called forward. I
14 want to make sure that all of you can hear everything I
15 say.

16 Can those in the back of the room hear me
17 all right?

18 (Prospective jurors nod affirmatively)

19 THE COURT: If any of you can't hear me at
20 any time, please raise your hand. This is important
21 not only for the 32 but also for the rest of you be-
22 cause it is likely that some of you will be called for-
23 ward to replace others who will be excused, so please
24 pay close attention to everything I say, all of you;

1 and once again, if any of you can't hear me, please
2 raise your hand and let me know.

3 My questions at this time are to assure that
4 we select a fair and impartial jury, the members of which
5 can listen to the evidence with an open mind, without
6 any pre-conceived ideas, and decide the factual issues
7 in the case fairly, impartially and solely on the basis
8 of the evidence presented in court.

9 As you know, this is a criminal case. The
10 defendant has been charged in the indictment with crim-
11 inal contempt. There are a number of fundamental prin-
12 ciples which I want to make sure you understand, by which
13 you will be guided.

14 As I have just said, the charges in the case
15 are contained in an indictment which was voted by a grand
16 jury. You should understand that an indictment is
17 merely an accusation, a charge by the grand jury. It
18 is a method by which individuals who it is claimed have
19 violated the law are brought into court. It is not
20 evidence of the guilt of the defendant. It is not evi-
21 dence of anything. It does not detract in any way from
22 the presumption of innocence with which the law surrounds
23 the defendant, and which is removed only if his guilt is
24 proven to the jury's satisfaction beyond a reasonable
25

1 doubt.

2 The presumption of innocence in the defend-
3 ant's favor is present now, it continues throughout the
4 trial, it continues into the jury room when you retire
5 to deliberate.

6 The government has the burden of proving the
7 charges contained in the indictment beyond a reasonable
8 doubt. Because this burden is exclusively on the gov-
9 ernment, on the prosecution, the defendant is under no
10 obligation to produce any evidence. The defendant has
11 an absolute right not to take the stand and testify, and
12 you may draw no inference whatsoever if the defendant
13 chooses not to testify.

14 I have mentioned that the government's burden
15 is to establish guilt beyond a reasonable doubt. If,
16 after a careful consideration of all of the evidence
17 presented, and following the principles of law that I
18 shall explain to you, you have a reasonable doubt as to
19 the defendant's guilt, you must acquit the defendant,
20 find him not guilty.

21 If, however, after a careful consideration of
22 the evidence and following the principles of law that I
23 will give to you, you have no reasonable doubt as to the
24 defendant's guilt, then you should find him guilty.

25 The jury's function is to decide questions of

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1 fact. You are the sole judges, and nothing that I say
2 about the facts, nothing the lawyers may say about the
3 facts, encroaches in any way on your role as the ex-
4 clusive finders of the facts. When it comes to the law,
5 however, you are to take your instructions as to the
6 law from me, and you are bound by my instructions. You
7 may not substitute your opinion of what the law is or
8 what you think it should be.

9 Now I am going to ask a number of questions.
10 If your answer to any of my questions is "yes", please
11 raise your hand. If your answer is "no", you don't
12 need to do anything.

13 Does any juror--and I am talking now to the
14 jurors numbered 1 through 32--does any juror have any
15 reservations as to accepting these fundamental principles
16 of law which I have just stated?

17 (No response)

18 THE COURT: Does any juror have any pre-con-
19 ceived ideas or prejudices that would prevent or hinder
20 you from following the instructions as to the law which
21 I will give you?

22 (No response)

23 THE COURT: Does any juror have any reservat-
24 ions as to accepting the proposition that the question
25

1 of punishment is for the Court alone, and that possible
2 punishment must not enter into the deliberations of the
3 jury as to guilt or innocence?

4 (No response)

5 THE COURT: Does any juror have any reserv-
6 ation as to the proposition that sympathy must not enter
7 into your deliberations, and that only evidence produced
8 in court may be used by you to determine the guilt or
9 innocence of the defendant?

10 (No response)

11 THE COURT: The defendant's name is Mr.
12 Louis Morales.

13 Mr. Morales, will you stand up, please?

14 (Defendant Morales stands)

15 THE COURT: Do any of you know Mr. Morales
16 or have any of you had any dealings with him directly
17 or indirectly, or with any of his friends or his family?

18 (No response)

19 THE COURT: Thank you, Mr. Morales.

20 (Defendant sits down)

21 THE COURT: Mr. Morales is represented by
22 Mr. Arnold Wallach, his lawyer.

23 (Mr. Wallach stands)

24 THE COURT: Do any of you know Mr. Wallach
25

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1 or ever had any dealings with him directly or indirect-
2 ly, or know anything about him?

3 (No response)

4 THE COURT: In this criminal case, as in all
5 cases in the Southern District of New York, the United
6 States is represented by the U. S. Attorney for the South-
7 ern District of New York, Mr. Robert B. Fiske, Jr.

8 Appearing on behalf of Mr. Fiske is Assistant
9 United States attorney, Mr. Richard McCarthy.

10 (Mr. McCarthy stands)

11 THE COURT: All right; seated at the govern-
12 ment's table is Mr. Jed Rakoff.

13 (Mr. Rakoff stands)

14 THE COURT: Do any of you know Mr. Fiske, Mr.
15 McCarthy or Mr. Rakoff?

16 (No response)

17 THE COURT: Have any of you ever had any
18 dealings with them, either directly or indirectly, or with
19 any members of their family or their close friends?

20 (No response)

21 THE COURT: Have any of you had any dealings
22 with the United States Attorney's office through other
23 people?

24 (No response)

25 THE COURT: Do any of you know or had any

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1 dealings directly or indirectly with any of the follow-
2 ing people:

3 Lloyd F. MacMahon?

4 (No response)

5 THE COURT: Inzer B. Wyatt?

6 (No response)

7 THE COURT: Vincent Cafaro--C-a-f-a-r-o?

8 Who sometimes uses the nickname "Fish"?

9 (No response)

10 THE COURT: Anthony Salerno, who uses some-
11 times the nickname "Speed"?

12 (No response)

13 THE COURT: During the trial you may hear
14 testimony from government officials. Would any of you
15 give greater weight or credibility to this testimony
16 because the witness is an employee of the government?

17 (No response)

18 THE COURT: Sometimes the government grants
19 a witness immunity from prosecution, which the law per-
20 mits. This means that the witness's testimony cannot
21 be used against him.

22 Is there anything in this procedure about
23 which any of you have any bias or prejudice?

24 (No response)

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1 THE COURT: Do any of you have any bias or
2 prejudice against the enforcement of the law which
3 makes it a criminal offense to disobey or resist a law-
4 ful order or command of a court?

5 (No response)

6 THE COURT: Have any of you, any member of
7 your family, close friend, ever been employed by any
8 Federal, State or local law enforcement agency?

9 (Several jurors raised their hands, after
10 which further questioning of the pros-
11 pective jurors took place).

12 THE COURT: All right. Do any of you, by
13 virtue of any present or past dealings or relationships
14 with any Federal, state or local law enforcement unit
15 have any bias, either for or against the government in a
16 criminal case?

17 (No response)

18 THE COURT: Do any of you, members of your
19 family, have any matters presently pending before any
20 law enforcement or investigatory agency?

21 (No response)

22 THE COURT: Have any of you ever been the
23 victim of a crime?

24 (Whereupon several jurors raised their
25 hands and there was further questioning)

(During the course of this questioning,
the following occurred:)

THE COURT: Is there anybody else?

(Prospective juror #3, Mrs. Rak, raised her
hand).

THE COURT: Juror number 3, Mrs. Rak.

PROSPECTIVE JUROR #3: I don't believe I would
make a good juror because I suffer emotionally, and I
would not be able--I can't see people suffering--that
is the only thing.

THE COURT: Mr. Reporter, would you read that
back?

(Record read by the reporter)

THE COURT: Well, why do you think you cannot
be a good juror because of that?

PROSPECTIVE JUROR #3: Because I suffered a
lot in my life, and I just can't see people in trouble.

THE COURT: All right, Mrs. Rack, you are ex-
cused.

MR. WALLACH: Excuse me, your Honor, may I ask
your Honor's indulgence and the United States Attorney at
the side bar?

THE CLERK: Juror #3, Mrs. Rak, excused by
the Court.

THE COURT: Yes, Mr. Wallach.

1 (Following at the side bar)

2 MR. WALLACH: Your Honor, I am constrained to
3 take exception to your excusing this lady who just ex-
4 pressed her reluctance, who still thinks she can stay
5 as a juror, notwithstanding her predilections. I take
6 exception to that most respectfully, if I have a stand-
7 ing to do so. I did not mean to be interruptive.

8 THE COURT: All right.

9 MR. WALLACH: Thank you.

10 (In open court; continued voir dire by
11 the Court)

12 MR. MCCARTHY: Your Honor, the government
13 is satisfied with the jury, and waives its last challenge.

14 THE CLERK: Satisfactory to the defendant?

15 MR. WALLACH: Satisfactory to the defendant.

16 THE CLERK: The jury is satisfactory to both
17 sides, your Honor.

18 THE COURT: Pick two alternates.

19 (Whereupon two alternate jurors were duly
20 empanelled)

21 THE CLERK: The remaining jurors, please re-
22 turn to Room 109, with the thanks of the Court.

23 THE COURT: Ladies and gentlemen, could you
24 hold that for just a moment, please.

25

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1 May I see counsel for a moment?

2 (Following at the side bar)

3 THE COURT: This is a question that came up
4 the other day, which we did not have to resolve, but I
5 think I will do it in the future. If one of the 12
6 is excused for any reason, the alternate that will re-
7 place that one is the one who is now designated as alter-
8 nate juror #1.

9 Is that agreeable to all of you?

10 MR. MCCARTHY: Yes.

11 MR. WALLACH: Yes.

12 Your Honor, could we adjourn now until a quarter
13 after two?

14 THE COURT: Well, let's get the jury sworn
15 in first.

16 MR. WALLACH: Thank you.

17 (In open court)

18 THE CLERK: Shall I swear the jury, your Honor?

19 THE COURT: Yes.

20 (Whereupon the jury of 12 and two alter-

21 nates were sworn by the clerk of the Court)

22 THE COURT: Mr. Green, ladies and gentlemen,
23 you are now the 12 jurors and the two alternates who
24 will try this case.

25 I want to tell you briefly how the case will

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1 proceed.

2 First, the Assistant United States attorney
3 will have the opportunity to make some opening remarks;
4 then Mr. Wallach, the defendant's attorney, will also
5 have that opportunity. Thereafter the government will
6 present its case. Following that the defendant, if he
7 chooses to do so, may present his case. Remember, he
8 has no obligation whatsoever to present any case. You
9 may not draw any inference whatsoever if he chooses not
10 to put in a case or to testify.

11 After all the evidence is in, the government
12 and then the defendant, their lawyers, will each have
13 an opportunity to make summations to you; and, finally,
14 I will charge you on the law applicable to the case,
15 and it will then be your job to retire and deliberate
16 and return your verdict.

17 Please remember throughout the trial to keep
18 an open mind. We all know from our own experience
19 that you hear one side of a story, you think it sounds
20 pretty reasonable. Then you hear the other side and
21 you begin to have doubts about the side of the story
22 you first heard; so it is important that you keep an
23 open mind throughout the trial.

24 It is also important that you do not discuss
25

1 the case during the trial or at any time until you re-
2 tire to deliberate. You do not discuss it among your-
3 selves or with anybody else, your family or anybody else.

4 All right, ladies and gentlemen, we will ad-
5 journ for lunch at this time and we will resume at
6 2:15.

7 Mr. Alonzo, the clerk, will show you where the
8 jury room is. You should come back after lunch to the
9 jury room.

10 THE CLERK: Jurors are excused until 2:15.

11 (Adjourned to 2:15 pm.)
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AFTERNOON SESSION

2:15 pm.

(Following in the robing room)

MR. WALLACH: My client waives his appearance here.

Your Honor, the case I mentioned earlier, I have the citation--People v Ruggiano, 332 NYS 2d 458, which is--

THE COURT: Yes, I have it.

MR. WALLACH: -- otherwise reported 39 AD 2d Series 113, 2d Department.

THE COURT: I haven't read the case. I am just reading the headnote. This is not quite the same case as ours. The headnote says:

"....the defendant after refusing to answer questions...was granted immunity....and he was warned that he could only be prosecuted for perjury or for contempt"--

MR. WALLACH: Right. 30 days, they told him.

THE COURT: -- "and his refusal to answer, which was not asserted on a claim of privilege could only be asserted in recognition of the consequences explained to him and was therefore the result of a deliberate choice, rendering him guilty of contempt".

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1 Then the second headnote says:

2 "Where the defendant was advised that, having
3 been granted immunity, he was liable only to a perjury
4 prosecution if he answered grand jury questions falsely,
5 or to punishment for violation of Section 750 of the
6 Judiciary law"--whatever that is--

7 MR. WALLACH: 30 days.

8 THE COURT:-- "if he refused to answer and
9 where, based upon that advice defendant elected not to
10 answer the questions, he could not now be prosecuted for
11 a different crime carrying with it different and additional
12 punishment for such refusal."

13 It seems to me that case doesn't help you at
14 all. It suggests where he was given a choice and he
15 made an election, he is guilty of contempt; and here what
16 happened was he was told "Either A or B is going to happen
17 to you", and he made a choice and did not answer; and
18 then he was indicted for C, and the Appellate Division
19 said you couldn't do that.

20 MR. WALLACH: As I recollect, I was a little
21 late covering it, frankly. What happened was that New
22 York State, as your Honor is aware, has a procedure
23 where if you desire to object under the Judiciary Law,
24 Section 750, you can be held in contempt and cannot do

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1 more than 30 days. This is not civil contempt; this
2 is criminal contempt. You cannot purge yourself.

3 He came out and was indicted and was convict-
4 ed as a result of that indictment, and the New York
5 State statute says you get credit for any time you did
6 on the other type.

7 We raised the question of double jeopardy.
8 I think the Waller v Florida case shows--at the time of
9 argument Judge Shapiro said to the defendant--I wasn't
10 there--"Must we write the brief for you?"

11 We did raise this issue in the sense that he
12 did the 30 days, so they held, without it being urged,
13 that having elected to do the 30 days he did exactly
14 what the prosecutor told him to do.

15 THE COURT: Well, it does seem to me that we
16 have an entirely different situation. We have a sit-
17 uation here which apparently is covered by the first
18 headnote, but not by the second, which was the basis
19 for the dismissal of the indictment.

20 In this case, just skimming the opinion now--and
21 I have not really read it carefully, but I see that at
22 the tail end the Court cites another State case and
23 quotes from it:

24 "Fundamental fairness also suggests that a
25

1 witness who is a potential criminal defendant, should
2 not be misadvised concerning the scope of immunity if
3 the grant of immunity has been amplified or explained
4 in any way."

5 MR. WALLACH: That not an issue here.

6 THE COURT: The on that we are dealing
7 with was whether or not, having been told that the pun-
8 ishment for failing to answer, having been granted im-
9 munity, a prosecution for either perjury or violation
10 of Section 750--having been told that, and he having
11 elected to continue to refuse to answer. you cannot
12 thereafter indict him for something else which carries
13 at least a greater penalty.

14 So it doesn't seem to me that this helps us.

15 MR. WALLACH: It is a question of intent. I
16 will have nothing to argue before the jury then.

17 THE COURT: Well, I sympathize with you and
18 with Mr. Morales.

19 MR. WALLACH: There is another issue, your
20 Honor. The prosecutor has stated in his brief that
21 relying on the lawyer's advice is no defense. My
22 understand^{ing} is you cannot give a lawyer \$25.00 and say
23 "I don't have to answer, my lawyer told me not to; I
24 am relying on that."
25

1 However, in an ancient case in 1935, Eustace
2 v Lynch, 80 F 2d Series 652, 9th Circuit, there was a
3 bankruptcy proceeding, and these people thwarted the
4 receiver, claiming some issue of title, held for con-
5 tempt for interfering with a court, and the court stated
6 that the advice of a lawyer, while not a complete de-
7 fense, is a mitigating factor.

8 In other words, I would say it is a partial
9 defense, but there is a stronger case that is more re-
10 cent--U. S. v Seale--that is a Chicago case--461 Federal
11 Reporter, Second Series, 345. They did hold that good
12 faith or reasonable belief that it was necessary to
13 act "contumaciously", in order to make a record on appeal,
14 to have it decided in the Circuit Court of Appeals is
15 a defense.

16 Now I did raise this question of electronic
17 sureveillance, and I was hoping this is a case that
18 maybe the Circuit Court of Appeals would either depart
19 from Persico, or else we will try to take it up
20 higher. It was thrashed out before Judge Lasker, and
21 he went back and he refused to answer, and it gave rise
22 to this indictment after he was ordered to do so by
23 Judge MacMahon.

24 Unfortunately for him, he spent less than a
25

1 week--is that correct, Mr. McCarthy?--in jail?

2 MR. MCCARTHY: He spent 5 days.

3 MR. WALLACH: 5 days. How could I appeal?

4 It would be mooted. There was no other way to test it.
5 As a matter of fact, that is the only way I can test it,
6 or any other contemnor can test it.

7 THE COURT: All right; you can still test it
8 on appeal, but the fact remains that it seems to me that
9 all you are arguing is that his refusal to testify was
10 in fact wilful and deliberate, and he knew what the con-
11 sequences were, that he might be found guilty of crim-
12 inal contempt. This would be something, of course,
13 from which you can take an appeal, but I do not think
14 that makes it a defense at this stage.

15 MR. WALLACH: Well, you see, Judge, frankly,
16 unless I do not know of any defenses to this thing,
17 except this Ruggiano case, and frankly it dawned on me
18 over the weekend when I was preparing this case and had
19 to speak over some other matters with him, I thought of
20 this and said "Where am I going to get a defense like
21 that?"

22 I was actually in that case.

23 THE COURT: As I say, Mr. Wallach, you have
24 my sympathy, but the question whether or not Mr. Morales
25

1 has a defense here is an entirely separate question as
2 to whether Judge Lasker was right and I was right in
3 my decision on his decision on the electronic surveillance
4 point. That is a question that you can, of course, and
5 may raise on appeal, but it seems to me the fact that
6 Mr. Morales did not testify and he knew what he was doing
7 because he and his counsel thought there might be an
8 appealable point doesn't create a defense for you at
9 this stage--I am pretty clear on that.

10 MR. WALLACH: Well, as I said, then I take
11 it, Judge, I certainly have no intention of being dis-
12 respectful or contemptuous, in my summation to the jury
13 I am going to be precluded from going on Abzug's advice
14 with regard to wilfulness?

15 THE COURT: Yes, I would think so.

16 MR. WALLACH: All right.

17 THE COURT: I would like to reconsider this
18 after we have been through the trial.

19 MR. WALLACH: All right.

20 THE COURT: And also my present inclination
21 is to rule that Mr. Morales cannot testify--it is no
22 defense for him to testify that he feared for his life.
23 The Piemonte case is pretty straightforward.

24 MR. WALLACH: I do not know why the U. S.
25

1 attorney injected that. I had no intention of doing
2 that, absolutely not--it never dawned on me.

3 THE COURT: Then we do not have any problem.

4 MR. WALLACH: I wasn't going to raise that
5 at all.

6 THE COURT: All right; let us go ahead and
7 we will talk again a little later on.

8 MR. WALLACH: What time can we anticipate
9 closing?

10 THE COURT: Well, I hoped we would be able
11 to finish this afternoon. I guess we won't be able to.
12 I haven't had a chance to go over my charge with you.

13 You think it might take an hour to put in your
14 case?

15 MR. MCCARTHY: I would think so, yes; it might
16 be even quicker than that, your Honor.

17 THE COURT: Well, let's say up to an hour, and
18 if we have finished, and then go over my charge, and to
19 consider once again these questions that you have raised,
20 Mr. Wallach, there won't be much left of the afternoon.

21 I would be disposed, unless you are going to
22 put in some evidence--well, even if you wish, I would
23 be disposed to let the jury go when we finish with the
24 evidence, and bring them back tomorrow morning for the

1 summations and the charge.

2 MR. WALLACH: That will be fine, your Honor.

3 THE COURT: Does that suit you, Mr. McCarthy?

4 MR. McCARTHY: That would be fine.

5 THE COURT: All right.

6 (In open court)

7 THE COURT: Counsel.

8 MR. McCARTHY: Your Honor, Mr. Foreman,
9 ladies and gentlemen of the jury, this case is a Federal
10 criminal case involving a purposeful refusal to obey
11 a court order.

12 The defendant, Mr. Louis Morales, is seated
13 at defense counsel table, was called to testify before
14 the grand jury. Before he was called, Mr. Morales was
15 ordered by the Court to testify before the grand jury,
16 and he was granted immunity.

17 Mr. Morales did not testify--not because his
18 testimony was pertinent but because he had been granted
19 immunity--

20 MR. WALLACH: Objection, your Honor. This
21 is a question of what they are going to prove--not a
22 summation at the end of the case. It is not a question
23 of immunity. I raised nothing about that.

24 MR. McCARTHY: It is clear, your Honor, from
25

1 the order that he was granted immunity.

2 THE COURT: I think it is all right.

3 MR. McCARTHY: My name is Richard McCarthy,
4 and I am an Assistant U. S. Attorney. Seated next to
5 me at counsel table is Mr. Jed Rakoff; he is also an
6 Assistant U. S. attorney.

7 We have the privilege of presenting the evid-
8 ence on behalf of the United States.

9 What I will tell you now is an outline of the
10 evidence which the government will be presenting.

11 What I say and what Mr. Wallach, the defend-
12 ant's counsel, says in his opening, is not evidence
13 and should not be considered as such.

14 On April 28th Mr. Morales was called before
15 the grand jury which was investigating the allegedly illegal
16 gambling activities of Anthony Fat Tony Salerno and
17 Vincent Cafaro.

18 Mr. Morales was read, at the time he appeared
19 before the grand jury, a court order which ordered him
20 to testify before the grand jury and which granted him
21 immunity for whatever testimony he gave before the grand
22 jury.

23 Now what is a grand jury? A grand jury is a
24 body which investigates whether there is evidence that
25

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1 a crime has been committed and on which it votes to
2 issue or not issue an indictment.

3 Also, what is immunity?--the immunity which
4 Mr. Morales had been given? In every day language,
5 immunity means that the testimony which Mr. Morales gave
6 or would give, in accordance with the court order, could
7 not be used against him; the government would be pre-
8 cluded from a prosecution based upon--
9

10 MR. WALLACH: Objection, your Honor; that is
11 not what he was granted. Now I object to this. May
12 we step up, your Honor?

13 THE COURT: Yes.

14 (At the side bar)

15 MR. WALLACH: Your Honor, he was not granted
16 immunity from prosecution. He was granted immunity
17 under the Kastiger ruling--that they will not use his
18 testimony, his future testimony against him.

19 There is nothing there about a transaction
20 of immunity that they won't prosecute--not a word.

21 MR. McCarthy: If I was able to finish the
22 sentence I would have said that whatever testimony he
23 gave would not be used against him.

24 MR. WALLACH: You used the word "prosecuted".

25 MR. MCCARTHY: He could not be prosecuted--

1 MR. WALLACH: I am sorry--if I don't jump the
2 gun they will claim I waived it. The Circuit Court
3 says you have to bring it to the court's attention
4 promptly.

5 THE COURT: Actually, what is the need to
6 bring out the grant of immunity in any way? He was
7 directed to testify.

8 MR. McCARTHY: The judge's order was--the
9 order provided, first, that he be granted immunity;
10 and, secondly, that he testify as to those matters on
11 which he would otherwise assert his Fifth Amendment
12 privilege against self-incrimination.

13 THE COURT: Is that in the order?

14 MR. McCARTHY: It is in the order.

15 THE COURT: Which I assume you will offer
16 in evidence.

17 MR. McCARTHY: That is correct.

18 THE COURT: And which I assume is admissible.

19 MR. WALLACH: He is arguing like before the
20 jury.

21 THE COURT: Let us go ahead. I think I
22 will say something to the jury in general terms right
23 now, but I think, Mr. McCarthy, from here on you ought
24 to stick to the language of the order precisely.

1 All right.

2 (In open court)

3 THE COURT: Ladies and gentlemen, I spoke to
4 you just before lunch, and I would like to remind you
5 of it, that you will reach whatever conclusions you reach
6 when you retire to deliberate, based only on the evid-
7 ence which is received here in court, not on the state-
8 ments of counsel as to what the evidence is, not on any-
9 thing I say about the evidence, but only on the basis
10 of the evidence itself.

11 Also you will bear in mind that I will tell
12 you what the law is which is applicable to this case,
13 and you are bound by my statement as to what the law is,
14 so that anything that counsel say with respect to the
15 law applicable to this case is not controlling; it is only
16 what I tell you the law is.

17 All right, Mr. McCarthy.

18 MR. McCARTHY: When Mr. Morales appeared be-
19 fore the grand jury, the order of Judge Wyatt was read
20 to him. The order directed Mr. Morales to testify as
21 to those matters for which he would otherwise be able
22 to assert a privilege against self-incrimination.
23 The prosecutor before the grand jury posed three ques-
24 tions to Mr. Morales to answer. These questions con-
25

1 cerned his knowledge of the activities of Anthony Salerno
2 and Vincent Cafaro.

3 What did Mr. Morales do when he was asked
4 these questions? He stated "I refuse to answer" because
5 an answer might tend to incriminate him. Yet he had
6 already received immunity in the order from Judge Wyatt,
7 and that answer was irrelevant.

8 He was asked before the grand jury whether he
9 understood that he had immunity from his testimony ex-
10 cept for prosecution for perjury--if he lied under oath
11 before the grand jury--and he answered that he under-
12 stood.

13 What happened next? The foreman of the grand
14 jury directed Mr. Morales to answer the questions that he
15 had been asked. Mr. Morales refused still to answer
16 those questions.

17 Mr. Morales then appeared before Judge Mac-
18 Mahon, another judge in this district court. He admitted
19 to Judge MacMahon that he knew what the order said,
20 he understood that he had immunity but he had still re-
21 fused to answer the questions. He had done this pur-
22 posefully and without any mistake.

23 Ladies and gentlemen, how is the government
24 going to prove its case? The proof in this case will
25 be relatively brief and straightforward. It will con-

1 sist of the order of the Court, and of transcripts of
2 Mr. Morales' appearance before the grand jury on April
3 28th, and on his appearance before Judge MacMahon on
4 the same day.

5 The transcripts are a written statement of
6 what was said at both of those places, taken down by
7 someone like the court reporter here this afternoon.
8 The reporter would take down the very words spoken by
9 Mr. Morales before the grand jury, the words spoken by
10 the prosecutor before the grand jury, and the words of
11 the foreman of the grand jury; and the words of Judge
12 MacMahon.

13 This case in many ways is somewhat different
14 from other criminal cases, because we actually have
15 someone literally at the scene of the crime taking down
16 what is happening as it happened.

17 MR. WALLACH: Excuse me a moment--I am going
18 to object and ask that that be stricken.

19 THE COURT: I think it is all right.
20 Overruled.

21 MR. McCARTHY: You will have these tran-
22 scripts before you, and you will be able to see with
23 your own eyes exactly what took place before the grand
24 jury and before Judge MacMahon.

25 Even though this case will be relatively brief

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1 and straightforward, nevertheless it is an important
2 case--important to the defendant here who is charged
3 with a serious federal offense. It is important--

4 MR. WALLACH: I will object to this--excuse
5 me a moment. I am going to object to this. He is
6 supposed to outline what they are going to prove--not
7 the importance of the case or anything else.

8 THE COURT: I think the jury understand what
9 Mr. McCarthy is saying, and I have already cautioned
10 him once again.

11 Go ahead, Mr. McCarthy.

12 MR. McCARTHY: It is important to the govern-
13 ment, which must enforce the laws passed by Congress, in
14 an attempt to maintain the integrity of the Court and
15 the grand jury system--

16 MR. WALLACH: Again, your Honor, this is a
17 summation.

18 THE COURT: Overruled.

19 MR. McCARTHY: It is also important to the
20 public which relies upon the grand jury to investigate
21 possible crimes, to obtain evidence through testimony
22 of witnesses before the grand jury.

23 I ask you to pay close attention to the evid-
24 ence as it is presented this afternoon. I trust that
25

1 when all the evidence is in, you will find the defend-
2 ant, Louis Morales, guilty as charged.

3 Thank you.

4 MR. WALLACH: Your Honor, may I say just a few
5 words?

6 THE COURT: Yes.

7 MR. WALLACH: Members of the jury, my name
8 is Arnold E. Wallach. I represent Mr. Morales.

9 I quite agree with the prosecutor that this
10 case is not like the usual case that some of you may
11 have passed upon in your serving on other juries.

12 This is a case known as criminal contempt.
13 The issue is that my client appeared and did not commit
14 any contempt before the grand jury. The indictment
15 clearly says the judge ordered him to answer questions,
16 and he refused. There is only one issue here as I
17 see it. We are not claiming an alibi, namely, that
18 he wasn't there. We are not claiming that.

19 We are not claiming that someone else did
20 it and they made a wrongful identification--we are not
21 claiming that.

22 Like all things in life that are simple,
23 simple facts can lead to complications. The issue in
24 this case is a very simple semantic one to express.
25

1 Did my client intentionally, purposely, without
2 any cause, refuse to answer? Did he refuse to go back
3 to the grand jury room to continue to be subjected to
4 questions and then answer or refuse to answer for a
5 reason? The question is his state of mind--that is the
6 issue in this case, and no other issue.

7 I am not claiming that he had no right to do
8 it. I am not claiming anything of the sort. I am
9 not claiming that there wasn't a court order. Of course
10 there was--that is the issue, and that is the issue for
11 you to determine. That is the question of fact for you
12 to determine in this case.

13 Thank you.

14 MR. McCARTHY: Firstly, your Honor, there
15 is a stipulation between counsel with respect to three
16 government exhibits, and if I may I would like to read
17 that stipulation into the record.

18 THE COURT: Yes, Mr. McCarthy.

19 MR. McCARTHY: It is hereby stipulated and
20 agreed by and between the defendant, Louis Morales,
21 by his attorney, Arnold E. Wallach, and the United States
22 of America by its attorney, Robert B. Fiske, Jr., United
23 States Attorney for the Southern District of New York,
24 as follows:

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1 April 28, 1977.

2 D) That government's exhibit 3 is an ac-
3 curate copy of the stenographic transcript of the testi-
4 mony given by Louis Morales at a hearing before the Hon-
5 orable Lloyd F. MacMahon on or about April 28, 1977.

6 Signed by counsel for the defendant, Arnold
7 E. Wallach and counsel for the government, Robert B.
8 Fiske, Jr., by Richard J. McCarthy.

9 Your Honor, if this might be marked as court's
10 exhibit 1, the stipulation.

11 THE COURT: Isn't it court's exhibit 2?

12 MR. McCARTHY: All right, your Honor.

13 (Stipulation marked Court's exhibit 2)

14 THE COURT: May I see it, please?

15 (Handed by the Clerk to the Court)

16 MR. McCARTHY: Your Honor, I would now ask the
17 Court to receive into evidence government's exhibits 1,
18 2 and 3 referred to in the stipulation.

19 THE COURT: Any objection, Mr. Wallach?

20 MR. WALLACH: No.

21 THE COURT: They are received.

22 (Government's exhibits 1, 2 and 3 marked
23 in evidence).

24 MR. McCARTHY: Your Honor, for the purpose
25

1 of presenting government's exhibits 2 and 3, which are
2 the transcripts, to the jury. I would call Paul Silverman
3 to the stand to read with me the transcripts, which con-
4 sist of government's exhibit 2 and government's exhibit 3.

5 THE COURT: All right.

6 MR. McCARTHY: Government's exhibit 2 is the
7 transcript of Mr. Morales' appearance before the grand
8 jury on April 28, 1977; and government's exhibit 3 is a
9 portion of the hearing before Judge MacMahon on April 28th,
10 that portion during which Mr. Morales was questioned by
11 the Court.

12 Your Honor, if I may also, before Mr. Silver-
13 man is sworn for the purpose of reading these two ex-
14 hibits, hand to the members of the jury copies of each
15 of the exhibits so that they can follow along the read-
16 ing of the documents as they are read by Mr. Silverman
17 and myself.

18 THE COURT: All right.

19 (Copies distributed to members of the
20 jury by Mr. McCarthy).

21 P A U L S I L V E R M A N, called as a witness by the
22 Government, being first duly
23 sworn, took the stand.

24 MR. McCARTHY: I will first read government's
25

1 exhibit 2, which is the 5-page document handed to the
2 jury.

3 MR. WALLACH: Excuse me, in the interests of
4 propriety, your Honor, I respectfully suggest that Mr.
5 Abzug be explained, because his name appears there--just
6 who he is.

7 THE COURT: All right, Mr. McCarthy.

8 MR. MCCARTHY: Mr. Abzug is listed on the
9 first page of government's exhibit 2, and he is an Assist-
10 ant United States Attorney, as stated on the first page.

11 "LOUIS MORALES, called as a witness, having
12 been duly sworn by the Foreman of the Grand
13 Jury, testified as follows:

14 "BY MR. ABZUG:

15 Q State your name and spell your last
16 name, please.

17 A Louis Morales M-o-r-a-l-e-s.

18 Q Where do you currently reside?

19 A 1954 First Avenue.

20 Q Mr. Morales, you've appeared before this
21 Grand Jury a number of times, and as I advised you on
22 prior occasions, you've been subpoenaed before this
23 Grand Jury in connection with a Grand Jury investigation
24 into alleged violations of the federal laws, specifically
25

1 those laws forbidding syndicated gambling, conspiring
2 to do so. The Grand Jury is interested in the il-
3 legal activities of men known to you as Anthony Salerno
4 also known as Fat Tony Salerno, Vincent Cafaro also known
5 as Fish, Cirino Salerno also known as Speed and others as
6 they occurred in the East Harlem area during 1975 and
7 1976.
8

9 "Now, when you appeared before the Grand Jury
10 on March 24, 1977, you were shown an order granting you
11 testimonial immunity. It was marked in evidence as
12 Grand Jury Exhibit Number 1. Correct?

13 A Yes.

14 Q Now, this order I believe was explained
15 to you and read to you. I'll read it once more.

16 "Now, therefore, it is ordered pursuant to
17 Title 18, United States Code, Section 6002 that the said
18 Louis Morales give testimony which he refuses to give
19 on the basis of his privilege against self-incrimination
20 as to all matters about which he may be interrogated
21 before said Grand Jury, and it is further ordered that
22 no testimony or other information compelled hereunder
23 or any information directly or indirectly derived from
24 such testimony or other information may be used against
25 the said Louis Morales in any case except a prosecution

1 for perjury, giving a false statement or otherwise fail-
2 ing to comply with this order.'

3 "That was signed on March 24th, 1977 by Judge
4 Wyatt.

5 "Subsequently, he refused to testify and he
6 raised certain legal defenses before Judge Lasker. On
7 April 22, 1977, Judge Lasker filed an opinion which I'm
8 marking as Grand Jury Exhibit Number 1. (So marked.)

9 Q Overruling those legal defenses. The
10 last paragraph states accordingly, 'The witness is dir-
11 ected to testify before the Grand Jury or be held in
12 civil contempt until such time as he does testify.'

13 Now, you understand now your obligations,
14 Mr. Morales?

15 A I do.

16 Q You're either to testify pursuant to
17 Judge Wyatt's order of immunity or the Government will
18 make an application to have you held in civil contempt
19 pursuant to Title 28, United States Code, Section 1826A.
20 I also wish to warn you that in addition to subjecting
21 yourself to civil contempt, you might also be indicted
22 for criminal contempt. Do you understand that?

23 A I do.

24 Q If you're cited for civil contempt, you
25

1 will remain in jail for the life of this Grand Jury
2 which expires on March 14, 1978, subject to three six
3 month extensions.

4 Knowing all that, sir, I ask you whether you know
5 a man by the name of Vincent Cafaro?

6 A Respectfully decline to answer the ques-
7 tion on the grounds that it would tend to incriminate
8 me.

9 Q Have you ever worked in a policy oper-
10 ation with Vincent Cafaro?

11 A I respectfully decline to answer the
12 question on the grounds that it would tend to incriminate
13 me.

14 Q Have you ever discussed a policy oper-
15 ation supervised by Anthony Salerno at 2226 First Avenue?

16 A I respectfully decline to answer the
17 question on the grounds that it would tend to incrim-
18 inate me.

19 Q You understand that under the terms of
20 Judge Wyatt's order, your testimony cannot be used
21 against you except for prosecution for perjury?

22 A I understand.

23 Q And knowing that, Mr. Morales, you're
24 still refusing to testify?

1 A I do.

2 "MR. ABZUG: Mr. Foreman, will you direct
3 the witness to answer the questions I've posed to him?

4 "THE FOREMAN: I so direct.

5 "THE WITNESS: I respectfully decline to
6 answer the question on the grounds that it would tend
7 to incriminate me.

8 "MR. ABZUG: Mr. Morales, I'm going to ad-
9 journ these proceedings. The Government will make an
10 application to have you held in civil contempt.

11 Will you excuse the witness, please?

12 "THE FOREMAN: You're excused, sir."

13 Now I will read government's exhibit 3, which
14 is two pages of In Re: Grand Jury Matter of: Louis
15 Morales, before Honorable Lloyd F. MacMahon, District
16 Judge, New York, New York, April 28, 1977 at 2:15 p.m.
17 Appearances by Michael B. Abzug, Esq., Assistant U. S.
18 Attorney; Arnold E. Wallach, Esq., Attorney for Louis
19 Morales.

20 "THE COURT: You understand, don't you, Mr.
21 Morales, that you have been given immunity for anything
22 you might say that would tend to incriminate you before
23 the Grand Jury?

24 "MR. MORALES: I do.

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1 "THE COURT: You understand also that you have
2 been ordered by the Court to answer the questions that
3 have been put to you?

4 "MR. MORALES: I do.

5 "THE COURT: And those questions were put to
6 you this morning and you refused to answer, is that cor-
7 rect?

8 "MR. MORALES: Yes.

9 "THE COURT: And you did that intentionally?

10 "MR. MORALES: Yes.

11 "THE COURT: Notwithstanding and with the full
12 knowledge of the fact that the Court had ordered you to
13 do it?

14 "MR. MORALES: That is right.

15 "THE COURT: You did that on purpose and
16 are not laboring under any mistake or anything of that
17 nature?

18 "MR. MORALES: I know what I was doing."

19 That is all of Mr. Silverman.

20 THE COURT: Thank you, Mr. Silverman.

21 THE WITNESS: Thank you, your Honor.

22 (Witness excused)

23 MR. McCARTHY: The government rests, your
24 Honor.

1 MR. WALLACH: May I step up?

2 THE COURT: Yes.

3 (At the side bar)

4 MR. WALLACH: Your Honor, with your Honor's
5 permission, in view of the type of proceeding I have
6 here, I would like to read the prior grand jury testi-
7 mony when Mr. Abzug advised him on a prior occasion as to
8 contempt, civil and/or criminal.

9 You have those minutes, don't you, Mr. McCarthy?

10 MR. MCCARTHY: April 25th, yes, I do.

11 MR. WALLACH: I would like to do that.

12 MR. MCCARTHY: I do not see the relevance of
13 that, because the proceeding before Judge Lasker resulted
14 in that particular appearance before the Grand Jury. It
15 wasn't until the 28th.

16 THE COURT: Well, it still might be relevant.
17 I have to read it. I would like to take another look
18 at it before I pass on your application, Mr. Wallach.

19 MR. WALLACH: I understand.

20 THE COURT: I will send the jury out for a
21 few minutes.

22 May I have your copy?

23 MR. WALLACH: Sure (handing to the Court)

24 THE COURT: Which do you want to read?

25 MR. WALLACH: April 6th.

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1 MR. McCARTHY: No, that is before Judge Lasker.

2 MR. WALLACH: February 24th and April 6th.

3 THE COURT: You tell me which portion you want
4 me to read.

5 (In open court)

6 THE COURT: Ladies and gentlemen, we will
7 take a short recess. You may retire to the jury room.

8 (A short recess)

9 (Following in the robing room)

10 THE COURT: I don't see why I shouldn't let
11 Mr. Wallarch read the March 24th grand jury testimony.

12 Here is a copy of that, Mr. Wallach (handing)--
13 except for that portion about electronic surveillance.

14 MR. WALLACH: Yes.

15 THE COURT: Do you have any problem with that,
16 Mr. McCarthy?

17 MR. McCARTHY: Well, I would just ask Mr.
18 Wallach for an offer of proof as to why he wishes this
19 to be read into evidence.

20 MR. WALLACH: I will give you an offer of
21 proof. It speaks for itself. I am going to claim
22 that Mr. Abzug's language was ambiguous in regard to
23 the types of contempt.

24 That is why I want to do it.

1 MR. McCARTHY: I thought your Honor had fore-
2 closed that particular issue on being presented to the
3 jury. It is not a permissible defense.

4 THE COURT: Well, I think that is correct.
5 I do think, however, it might be useful to have this
6 before the jury.

7 You will notice, Mr. Wallach, that on page 22
8 Mr. Abzug says at lines 17 and 18, "If you are indicted
9 for criminal contempt you could be severely penalized
10 for that as well."

11 MR. WALLACH: Yes, I noticed that.

12 THE COURT: I do not think there is any am-
13 biguity about what Mr. Abzug said. He said that "There
14 are two things that can happen to you--civil contempt
15 or criminal contempt, and for civil contempt you will
16 stay in jail for the life of the grand jury, and for
17 criminal contempt you could be severely penalized for
18 that as well."

19 So he is saying to Mr. Morales both of these
20 proceedings can be instituted against him.

21 MR. WALLACH: I appreciate that, your Honor,
22 but still the question is that it is his state of mind.

23 I grant you what your Honor says about it;
24 it is quite clear to a person trained in law and who
25

1 knows these expressions, but without this, your Honor,
2 the prosecutor is going through an open door with a
3 battering ram.

4 THE COURT: I don't think that is a good way
5 to describe it.

6 MR. WALLACH: Well, analogies are not always
7 applicable.

8 THE COURT: I do not think this supports the
9 position that you want to take. I think it cuts against
10 it.

11 MR. WALLACH: Well, your Honor, I submit that
12 perhaps the prosecutor can argue that before the jury
13 and say that I am wrong or that Mr. Morales knew all
14 about this, both types of contempt.

15 THE COURT: If you had wanted to discuss this
16 earlier, my view was at least tentative at that point,
17 but it doesn't make any difference whether Mr. Abzug
18 stated it as two separate alternatives, both of which
19 could apply, and certainly it seems to me to be clear
20 under the State court case which you referred us to,
21 the Ruggiero case, that doesn't constitute a defense.

22 I would see no reason to suppose that that
23 isn't also the law in the criminal court.

24 MR. WALLACH: Believe me, your Honor, I am not

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1 trying to argue the law before the jury; I am trying
2 merely to say what I can about lack of intent. He may
3 have been confused. The fact that he shouldn't be con-
4 fused, the fact that a person under those circumstances
5 would not be confused, I submit to your Honor are ques-
6 tions of fact. I mentioned this before the jury. If
7 I tried it before your Honor as the trier of the facts,
8 but I have a jury here, for whatever it is worth; other-
9 wise there is nothing for me to say.

10 MR. McCARTHY: Your Honor, the order of the
11 Court is the knowing knowledge and wilfulness that goes
12 to his understanding. The court order doesn't go to
13 what he thought might be the consequences, but rather
14 that he understood what he was being directed to do
15 under Judge Wyatt's order.

16 MR. WALLACH: And he did exactly that. Judge
17 MacMahon questioned him, mentioned civil contempt. He
18 committed him for civil contempt. That is a further
19 basis for my argument. He went to jail for civil con-
20 tempt.

21 MR. McCARTHY: The issue is whether he under-
22 stood that he was being told to testify before the grand
23 jury and that he was being granted immunity. That is
24 what his knowledge goes to. It is not whether he thought
25

1 he might escape completely unscathed or whether he was
2 subject to a minor penalty.

3 THE COURT: In that sense you are saying it
4 is cumulative.

5 MR. McCARTHY: I am saying that it is totally
6 irrelevant.

7 THE COURT: Well, on that I am not sure it is
8 totally irrelevant. I don't think it is relevant or I
9 wouldn't receive it, rather, because of the point that
10 Mr. Wallach wishes to make that he was confused; but I
11 am wondering if it isn't sufficiently part of the entire
12 package so that it ought to be in front of the jury in
13 any event.

14 MR. McCARTHY: My problem is more with Mr.
15 Wallach's offer of proof and the purpose for which he
16 wishes to have a portion of these minutes introduced
17 in evidence.

18 THE COURT: I guess what I am saying is the
19 fact that he went through this three times rather than
20 just the two times that the jury has heard about, goes
21 to the question of whether or not he understood that
22 there was a lawful order outstanding and that he was
23 required to answer.

24 I do not know that the third time adds very
25

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1 much but perhaps it adds a little bit to the govern-
2 ment's case. The government apparently doesn't wish
3 to use it, but I must say, Mr. Wallach, if the only
4 purpose that you have in mind is to make the argument
5 that he thought he was being given a choice, I don't
6 know that that is a good enough reason. It doesn't
7 seem to me that merits going into it.

8 MR. WALLACH: Your Honor, again I say most
9 respectfully, I think we are saying that it is not a
10 defense, it is not a factual defense. Certainly any-
11 thing that goes into the record could be the basis of
12 the summation. Your Honor is going to charge on pur-
13 posefulness and what wilfulness is.

14 THE COURT: Well, if it is not a factual de-
15 fense then it shouldn't be presented to the jury; it
16 should be presented to me as a legal defense. Of
17 course I can consider that as a legal defense for what-
18 ever it is worth.

19 MR. WALLACH: I meant it as a factual de-
20 fense--that is what I meant. I wouldn't go to the
21 jury with a legal defense--that is clear, your Honor.
22 But again I want to stress it is factual. I want some-
23 thing to argue before the jury, that the man was there
24 a few times and he was told these things. They can
25 consider whether this is wilful.

1 THE COURT: I take it the question of wil-
2 fulness is whether he understood that he was supposed
3 to answer and he declined.

4 MR. WALLACH: Declined to answer and he was
5 held in civil contempt, which is exactly what was prom-
6 ised.

7 THE COURT: Well, it did not make any differ-
8 ence what kind of contempt he was held for--that is my
9 point.

10 I think all that your argument amounts to is
11 that he shouldn't have been indicted because he thought
12 that he had a choice between civil contempt and crim-
13 inal contempt.

14 MR. WALLACH: Again I am not re-arguing the
15 motion. I tried to persuade your Honor on that, but I
16 want to go before the jury and tell them under these
17 circumstances he was confused, and that is the issue, at
18 the very least.

19 THE COURT: Maybe he was confused about the
20 consequences, but it doesn't seem to me that bears on
21 whether or not he committed a criminal attempt, so far
22 as the jury is concerned. So far as the statute is
23 concerned--6,000-something--

24 What is the statute?

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1 MR. McCARTHY: 6002, 18 United States Code,
2 Section 401(3).

3 MR. WALLACH: Well, it is a question of in-
4 tent, your Honor. I want to tell the jury that, at
5 the very least.

6 THE COURT: And this intent that we are talk-
7 ing about, whether he understood that he was supposed
8 to answer and he refused to answer.

9 MR. WALLACH: For civil contempt.

10 THE COURT: Either way. The kind of pun-
11 ishment that resulted or whatever consequences resulted
12 is not part of the crime.

13 MR. WALLACH: Well, I do not want to belabor
14 the point--that is the offer I am making, and that is
15 what I intended to do at the very least.

16 THE COURT: As I say, I would be perfectly
17 willing to let you read this earlier grand jury colloquy,
18 but I won't let you argue the point that you want to make
19 from it.

20 MR. WALLACH: Then may I have it marked for
21 identification, your Honor?

22 THE COURT: Yes, we will mark it as another
23 court's exhibit.

24 (Prior grand jury testimony marked
25 Court's exhibit 3)

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xxx

1
2 THE COURT: For the record, what we marked
3 as Court's exhibit 3 is the transcript of the testimony
4 of March 17, 1977.

5 MR. WALLACH: Your Honor, in view of the short-
6 ness of the trial, I hope your Honor will charge that
7 as a matter of law the only people present that can be
8 present before the grand jury are the witness and the
9 prosecutor and the stenographer, and no lawyer could be
10 present. I won't deny that on certain occasions I was
11 outside in the hallway--I am not going to deny that.

12 THE COURT: What about that, Mr. McCarthy?

13 MR. McCARTHY: Obviously any such charge would
14 have to be complete, would have to reflect the fact that
15 the attorney could be immediately outside.

16 MR. WALLACH: I said that.

17 MR. McCARTHY: However, that he may at any
18 time--

19 MR. WALLACH: I was available.

20 MR. McCARTHY: Leave the grand jury room
21 when there is a question pending and go out and consult
22 with the attorney and come back.

23 MR. WALLACH: Yes.

24 MR. McCARTHY: All of that would have to be
25 incorporated.

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1 MR. WALLACH: You know, the minutes you put
2 in--I am trying to be very candid--the minutes you put
3 in say "APPEARANCES: Michael D. Abzug, Esq.", and I
4 specifically made a request of the court that you ex-
5 plain who he was, and then I will argue that he was
6 present with Mr. Abzug.

7 THE COURT: Yes, you can argue that.

8 MR. WALLACH: All right. You see, Mr. Mc-
9 Carthy, I am really trying to be fair.

10 THE COURT: If all we have left is the charge,
11 I guess we ought to turn to that now.

12 Do you have any other evidence that you want
13 to present?

14 MR. WALLACH: No, Judge.

15 THE COURT: I am wondering--well, I have a
16 session at a quarter of 5, so I guess we had better send
17 the jury home, and then we will go over the charge.

18 I will ask the jury to be back here at 10
19 o'clock tomorrow morning.

20 MR. WALLACH: Fine.

21 THE COURT: Even if I were to get my charge
22 to the jury, I would have to adjourn before you could
23 sum up, so I think it is better to do it all at once.

24 MR. MCCARTHY: The summations will be probably
25

1 fairly brief.

2 THE COURT: I would think so, but I do not
3 know that we can get it all in by 4:30.

4 MR. WALLACH: Judge, I do not mind--and I do
5 not think any other lawyer will--I am not at all critical
6 of the court, but the acceleration, the pressure they put
7 on lawyers and they put you on trial immediately--the
8 Circuit Court of Appeals gets it in 30 days, and it
9 makes a lawyer incompetent. I work seven days a week
10 and it is impossible to keep up.

11 THE COURT: Well, we do not have time today
12 to have the summations and the charge by 4:30, so what
13 we will do is send the jury home, and we will start
14 tomorrow at 10 o'clock; but I do want to go over my
15 charge with you as soon as I send the jury home.

16 MR. WALLACH: Can we make the motions this
17 afternoon?

18 THE COURT: Yes.

19 Anything else, Mr. McCarthy before I dismiss
20 the jury?

21 MR. MCCARTHY: No, your Honor. Do you wish
22 to go over the charge now?

23 THE COURT: Yes, but let's get the jury out.

24 (To Mr. Wallach) You will rest also.

25 MR. WALLACH: Yes, I will rest on the record

1 and make the motions and get that over with.

2 THE COURT: All right. You can make the
3 motions after you have rested; you can make them as if
4 you had made them before you rested.

5 (In open court)

6 (Jury in the box)

7 THE COURT: Mr. Wallach?

8 MR. WALLACH: The defendant rests.

9 THE COURT: All right, ladies and gentlemen,
10 the trial is now over. I have some matters to discuss
11 with the lawyers which will take me the rest of the after-
12 noon, so I am going to send you home now.

13 I want to remind you that you may not discuss
14 this case among yourselves or with anybody else. We
15 will see you here tomorrow at 10 o'clock. Have a good
16 evening.

17 You may leave those papers on your seats or
18 on the bench.

19 (Jury left the court room)

20 THE COURT: All right, counsel, let's adjourn
21 to the robing room.

22 (Following in the robing room)

23 MR. WALLACH: Do I make the motions now, your
24 Honor?

1 THE COURT: Yes, go right ahead.

2 MR. WALLACH: Your Honor, at this time--

3 THE COURT: As we agreed, you will make this
4 motion, if you wish to do so, as if it was at the end
5 of the government's case.

6 MR. WALLACH: Yes, your Honor. I am making
7 a motion under Rule 29 for an order of judgment of acquit-
8 tal. I am not going to revive all the other things I
9 said during the trial, which was very brief, and I cer-
10 tainly would like to urge all motions I made before the
11 trial, especially with regard to the right of the grand
12 jury and the jurisdiction of the grand jury to indict
13 for criminal contempt. However, I do want to say this
14 for the record, your Honor, and I realize that I have
15 got to think of the future--Your Honor, I am now going
16 to challenge the Kastiger ruling, that the order of im-
17 munity was not complete or not co-extensive with my
18 client's rights under the Fifth Amendment to the Federal
19 Constitution, insofar as it relates to the privilege against
20 self-incrimination.

21 I am now also going to again challenge the
22 issuance of an order granting immunity on the grounds
23 that it is not an adversary proceeding; that under Title 3--
24 Article 3 of the Constitution the Courts decide cases

25

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1 and controversies. In submitting an order of this
2 type, after the United States attorney requests an of-
3 ficial of the Department of Justice who has a standing
4 to authorize such an application, is not an Article 3
5 proceeding; it is merely perfunctory, and I say this
6 with respect, that Congress I do not believe had the
7 constitutional right to tell courts they have no dis-
8 cretion in granting immunity and relegate the courts to
9 being an agency to the executive branch of the govern-
10 ment.

11 I do not want to waste the time of the Court
12 on the wire-tapping--I made that motion.

13 Your Honor, may I say this most respectfully--
14 I represented a co-defendant in the Salerno case. I had
15 gotten a group of warrants that are very thick from
16 other counsel--I did not look at them; we had other
17 counsel in working together, but did not work on them
18 before Judge Knapp. I do not know whether those war-
19 rants applied to Mr. Morales or not. I mean there are
20 a myriad of them with names, and quite complex.

21 Do I take your Honor's decision to be even if
22 I raised the issue of electronic surveillance in this
23 case, that your Honor would not countenance or condone
24 or permit a motion to suppress to be made?

1 THE COURT: In which case?

2 MR. WALLACH: In this very case. In other
3 words, there are warrants in another case--United States
4 v Salerno, Cafaro and a number of other defendants.
5 Two weeks ago counsel got the warrants with the support-
6 ing papers. I haven't gone through them--

7 THE COURT: Warrants to--

8 MR. WALLACH: Evesdrop. I have no way of
9 knowing whether my client is mentioned in them, but as-
10 suming that I did know, would your Honor permit a motion
11 to be made to suppress? Your Honor did deny my motion
12 for a production. I do not know of any other warrants
13 for him; it is a secret. They won't tell me.

14 THE COURT: I do not quite see how that could
15 be relevant to this case.

16 MR. WALLACH: Well, that was going to be a
17 defense, that the warrants may have been void.

18 As I say, I have not gone through them yet; I
19 do not know whether they are relevant yet, but I want to
20 be very fair--Mr. McCarthy did mention to me--

21 Well, you got the warrants, did you not, Mr.
22 McCarthy?

23 MR. MCCARTHY: I found out that there were
24 in this other case, in which the grand jury was invest-

1 igating, that you received some--

2 MR. WALLACH: I received some about two weeks
3 ago. I did go through them.

4 MR. McCARTHY: But I had no responsibility
5 for that case, and I had no idea--

6 THE COURT: Well, I don't see how I can give
7 you an off-the-cuff reaction, Mr. Wallach. You may,
8 of course, after you have had a chance to look into it,
9 if it should happen that your client is convicted here
10 and you wish to raise this question with me later on to
11 set aside the conviction, of course you can do so.

12 MR. WALLACH: Thank you. As I said, I am not
13 trying to be threatening, you know--

14 THE COURT: I understand.

15 MR. WALLACH: -- but in case of an appeal
16 they have a habit of saying, "Well, you knew about it."
17 I don't know about it; I did not go through them yet.
18 I do not know what warrants--they may have other war-
19 rants, and I just have no idea, and I don't want to be
20 faulted by them saying that because I made a mistake I
21 neglected my client's case.

22 MR. McCARTHY: I think counsel is unnecessarily
23 minimizing his ability. He has done a competent job.
24 He has made quite a number of pretrial motions.
25

1 THE COURT: All right, Mr. Wallach, if you
2 feel it is something that you should do so later on, to
3 file a post-trial motion, by all means you may do so.

4 MR. WALLACH: Thank you very much.

5 THE COURT: Well, your motion under Rule 29
6 is denied, and I am assuming that you renew it at the
7 end of your case, and it is denied again.

8 MR. WALLACH: I have to renew it.

9 THE COURT: Now, my charge is relatively simple.

10 I will have the usual boiler-plate at the out-
11 set, which repeats what I have already said--that they
12 have to decide the facts; they have to take the law
13 from me; they can't substitute anything, which the lawyers
14 or I have said in place of the evidence.

15 The government is entitled to no greater con-
16 sideration and no lesser consideration than that accord-
17 ed to the defendant.

18 I will repeat what I told them previously,
19 about an indictment and its significance, and the gov-
20 ernment's burden, and the presumption of innocence; and
21 the fact that the defendant doesn't have to testify,
22 and that they may not infer anything from the fact that
23 he failed to testify or did not testify and did not
24 come forward with any evidence.

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1 I will explain to them reasonable doubt,
2 and then I will read the statute to them, 4013; and also
3 I will read the indictment.

4 Then I will use the government's request #6--
5 do you have that in front of you, Mr. Wallach?

6 MR. WALLACH: Yes, sir.

7 THE COURT: I want you to interrupt me as I
8 go along if there is anything that you object to.

9 Request #6, to explain the elements of crim-
10 inal contempt.

11 As to request #7, I will give #7.

12 Request #8, I am going to change that just
13 a little bit. In the second paragraph I will say:

14 "Now what is meant by "wilfully and knowingly?"

15 "Knowingly" means to act purposely and del-
16 iberately rather than through mistake, inad-
17 vertence or other innocent reason."

18 I am a little uncertain as to what to say
19 about "wilfully". I think it means here, and
20 I think it always means, something different from know-
21 ingly. I think there is an element of wilfulness, of
22 knowledge that you are violating the law--and I propose
23 to add that thought.

24 Does anybody object to that?

25 (No response)

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1 THE COURT: I take it there is no objection.

2 MR. McCARTHY: When you say "violating", that
3 your actions are not in accordance with--

4 THE COURT: In accordance with the law gen-
5 erally--not a specific particular statute.

6 MR. McCARTHY: Not the specific order or this
7 particular case.

8 THE COURT: Well, the "knowingly" part of it
9 means that he knew that it was--that he purposely and
10 deliberately refused to obey the order; and the "wilful"
11 part of it is that he knew when he refused to obey the
12 order, that what he was doing was against the law--
13 the law generally as distinguished from the order of
14 Judge Wyatt or Title 18, Section 401 (3).

15 MR. McCARTHY: The only reason I have some
16 concern is in part because of what we discussed earlier
17 with regard to the advice of counsel, and that type of
18 instruction could be misunderstood in that regard--that
19 someone might think that he was not--that what he was
20 doing was not against the law even though in fact it
21 was, because what he thought was based upon what he was
22 told by counsel, and that argument is cited in a number
23 of cases.

24 THE COURT: Yes. It seems to me that per-
25

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1 haps the charge ought to include something which you
2 have in your memorandum--that is, his decision not to
3 testify is a personal one which he has to make for him-
4 self, and he has to make that decision knowing that by
5 doing so, by refusing to answer, he is violating the
6 law.

7 It seems to me there ought to be something in
8 here to cover that element which is in the indictment.

9 I note that the statute doesn't use the word
10 "wilful", but I think it should be in the charge.

11 Do you have any problem with that, Mr. McCarthy?

12 MR. McCARTHY: I have no problem with the
13 word "wilful" as proposed in the language that you are
14 suggesting, that might be subject to misunderstanding.

15 THE COURT: That is a good point, and it seems
16 to me I take care of that by instructing them that his
17 decision not to testify pursuant to the Court's lawful
18 order is a decision that he has to make personally, and
19 that perhaps I should go on and say that advice of counsel
20 is no defense.

21 MR. WALLACH: Except, your Honor, that I re-
22 spectfully urge that it be considered as bearing upon
23 intent.

24 THE COURT: That is what we are talking about.
25 Well, I am concerned enough about this so that

1 I think I will want to reflect on it for a while, and
2 I will let you know tomorrow morning what I am going to
3 do about that.

4 What does "contumaciously" mean, Mr. McCarthy,
5 as stated in the indictment?
6

7 MR. McCARTHY: In all honesty I did not draft
8 the indictment so I can't give you a precise definition,
9 your Honor.

10 THE COURT: I suppose "contumaciously" means
11 the same as "with contempt" or thereby putting himself
12 in contempt. Perhaps we do not need to define it.

13 I won't define it unless either one of you
14 wants me to define it.

15 Mr. Wallach?

16 MR. WALLACH: No.

17 THE COURT: Mr. McCarthy?

18 MR. McCARTHY: No.

19 THE COURT: The indictment also uses the
20 word "unlawfully", which comes back to the point I have
21 been talking about, the definition of "wilfulness" and
22 "unlawfulness".

23 All right.

24 MR. WALLACH: There is one little problem
25 that I see--

1 THE COURT: Well, I haven't gone through them
2 all.

3 MR. WALLACH: I am terribly sorry.

4 THE COURT: And I don't know that I need re-
5 quest #9--do I?

6 MR. McCARTHY: I think it is the reason in-
7 cluded in government's exhibit 2 by the defendant for
8 not answering the questions.

9 That was his response. In case there is any
10 doubt or confusion in the jury's mind as to the effect
11 of Judge Wyatt's order, depriving him of that particular
12 defense, request #9 at least clarifies the situation to
13 the jury.

14 THE COURT: Yes; that seems to me to make
15 sense, Mr. Wallach.

16 What do you think?

17 MR. WALLACH: Precisely. I raised that on
18 the motion and suggested that your Honor tell the jury
19 that you cannot go into the question of privilege and
20 self-incrimination before the grand jury; but the way
21 the prosecutor has it worded over here--look at the
22 last three lines:

23 "Lest there be any confusion the privilege
24 against self-incrimination is not a defense

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"in a criminal contempt case against the defendant."

He is not taking the stand. It may confuse the jury completely. That is one thing you want to avoid.

THE COURT: I think we will take that out.

MR. McCARTHY: I will consent to strike that out.

THE COURT: All right; then we will include 9 and 10.

Looking at request #11, we have not been into that.

MR. WALLACH: No, there is no evidence about that. It is perfectly all right with me--I will stipulate that.

MR. McCARTHY: It is not necessary.

THE COURT: All right; #11 is out.

12 is out.

13 is part of my standard charge in any event.

14, I will say something like that. I do not need to go into the difference between direct evidence and circumstantial evidence.

This may be off the record.

(Discussion off the record)

THE COURT: Now back on the record. We do

1 not need to go into the credibility of witnesses.

2 I will talk about sympathy, and I will say--
3 well, I have already covered that--the punishment as-
4 pect I have covered.

5 I guess that's it.

6 Yes, Mr. Wallach?

7 MR. WALLACH: I think there is a great prob-
8 lem here. As I said, if I got the charge earlier--I am
9 not faulting the prosecutor, and I know the problem
10 with paper work.

11 Your Honor, may I suggest something in this
12 case, a word about the relevancy of the questions? I
13 take it the prosecutor's answer is that they don't have
14 to go into that once the judge orders that he answer the
15 questions.

16 THE COURT: I think that is right. A judge
17 has concluded that they were proper questions.

18 MR. WALLACH: Well, I do not like saying this
19 but we are back to where--

20 THE COURT: I think perhaps the point should
21 have been raised before Judge MacMahon, but in any event
22 I do not think I have to pass on this. In fact, I am
23 quite sure I do not need to, but if I were supposed to
24 pass on that question I would find that the questions,

1 from what little I know of the situation, were proper.

2 MR. WALLACH: That's it, Judge.

3 If I may take a minute of your time, I know
4 you have been very patient. This is a criminal case.
5 This man faces a jail term which is not even specified
6 by Congress. I have to appeal to the sympathy of the
7 Court, and yet Judge MacMahon's order, Judge Lasker's
8 order, and Judge Wyatt's order have the effect of work-
9 ing a collateral estoppel in favor of the government
10 against the defendant.

11 This is a criminal case, and that is what the
12 prosecutor has taken as their position, in effect.

13 THE COURT: Well, to the extent that those
14 orders were subject to review by me, I, of course, ad-
15 here to them.

16 MR. McCARTHY: Your Honor, on a subject that
17 Mr. Wallach raises earlier with respect to a charge con-
18 cerning what happens in the grand jury room, upon re-
19 flection I am willing to consent to something to be in-
20 cluded in that which would explain that the witness is
21 in the grand jury room, that he has an attorney outside,
22 that he has a right to go outside at any time when ques-
23 tions are asked him, to consult with his attorney, and
24 so forth.

25 MR. WALLACH: I will stipulate to that.

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1 Can we work out that stipulation tomorrow on
2 the record?

3 MR. McCARTHY: Well, I can draft something
4 on it.

5 MR. WALLACH: There is no evidence of it.

6 THE COURT: If you do it that way--actually
7 I see all of that was stated to the witness by Mr. Ab-
8 zug. Perhaps if you need the source for the language
9 you will find it there.

10 But why don't we enter into a stipulation on
11 that the first thing tomorrow morning?

12 MR. WALLACH: That will be fine, your Honor.

13 THE COURT: All right.

14 MR. WALLACH: Thank you, your Honor; I take
15 it/we are excused?

16 THE COURT: Yes.

17 MR. WALLACH: I take it my client is con-
18 tinued on parole--I think he is on his own recognizance.
19 They were very nice about it.

20 THE COURT: Yes.

21 (Adjourned to July 12, 1977 at 10 am.)
22
23
24
25

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1 July 12, 1977
2 10 am
3 USA v Morales

4 TRIAL CONTINUED

5 (In the robing room)

6 MR. WALLACH: Your Honor, the U. S. attorney
7 has given me a supplemental charge. I have no ex-
8 ception to that.

9 MR. McCARTHY: This is what we discussed
10 yesterday on the grand jury.

11 THE COURT: Oh, you are not going to do it
12 by stipulation?

13 MR. WALLACH: Well, I will stipulate to it;
14 I have no exception, your Honor.

15 THE COURT: All right.

16 MR. WALLACH: I have another application to
17 make, your Honor.

18 THE COURT: Let me just read this.

19 (After examining) Yes?

20 MR. WALLACH: Your Honor, yesterday there was
21 introduced an exhibit which was the proceedings before
22 Judge MacMahon, who issued the commitment in this case.
23 In that record there are statements directed to my
24 client where, in effect, my client responded, showing
25 that he knew what he was doing.

1
2
3 Now perhaps I was at fault for not objecting
4 on the basis of the privilege against self-incrimination.
5 The point was that I did not want to raise the issue of
6 mental instability or that my client was unconscious.
7 I should have perhaps advised him right then and there
8 to claim the Fifth Amendment, but I did not do it. All
9 right, that is all done with; but now the prosecution
10 has put that in evidence, and I would ask your Honor to
11 strike that part where my client, in effect, was incrim-
12 inating himself. I don't think it was the intent of
13 Judge MacMahon to lay a foundation for a trial for crim-
14 inal contempt. I don't think that the proceedings
15 there were to be used or the purpose was to be used in
16 another case at another time before another jury; and,
17 your Honor, I am going to ask you respectfully to strike
18 that out.

19
20 THE COURT: But at the end of this hearing
21 what did Judge MacMahon do?

22
23 MR. WALLACH: He signed the commitment and
24 remanded the defendant.

25
26 THE COURT: And what happened as a result
27 of that?

28
29 MR. WALLACH: Well, he did 5 days. The gov-
30 ernment wasn't satisfied with that, and they got him

1 indicted.

2 THE COURT: Mr. McCarthy?

3 MR. WALLACH: I had no idea at that time,
4 Judge. Frankly, maybe I was incompetent. Maybe my
5 representation, by not objecting earlier, may have
6 been a farce and a mockery, and my client was not re-
7 presented, and I am doing the best I can and asking you
8 to strike it out. I do not think it is proper to use
9 the colloquy before another judge before another jury.
10 He admitted it to the Judge.

11 MR. McCARTHY: Your Honor, Mr. Wallach was
12 quite good and diligent; he certainly filed a number of
13 motions in this case.

14 With respect to his application here, first,
15 you cannot assert the Fifth Amendment privilege after
16 you have answered a particular question. That auto-
17 matically waives the privilege, but more importantly
18 the time for objecting was when this was offered in
19 evidence. It has already been read to the jury.

20 It is much too late at this point for him to
21 object to it, and this goes really to the heart of the
22 case.

23 When Mr. Wallach was giving his opening state-
24 ment, he said the issue in the case is intent, and this
25

1 clearly is some of the most probative evidence that
2 there is--the admissions of his own client when he was
3 questioned by the court.

4 THE COURT: Well, I think, Mr. Wallach, if
5 you had raised this question yesterday I would have
6 overruled you. Mr. Morales answered Judge MacMahon's
7 questions, obviously understanding them and knowing what
8 he was saying when he answered the questions. At least
9 this appears to me to be obvious from the transcript.

10 MR. WALLACH: In effect he pleaded guilty.

11 Perhaps I should have objected then. I frank-
12 ly did not think--it just didn't dawn on me that there
13 would be an indictment.

14 THE COURT: I am wondering--well, I won't
15 speculate about that.

16 I think it is too late now, Mr. Wallach; I
17 am sorry.

18 MR. WALLACH: I take exception.

19 THE COURT: So I will deny your application.

20 MR. WALLACH: Judge, I do not want to belabor
21 the point, but why should the man be prejudiced because
22 I was incompetent?

23 THE COURT: I don't know that it was as a re-
24 sult of anything that you did or failed to do, Mr.
25 Wallach.

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1 Mr. Morales, from the other proceedings, was
2 fully aware that he was represented by counsel, fully
3 aware, it seems to me, of what was going on, and so far
4 as I can tell from the record, able to make up his own
5 mind as to what he wanted to do.

6 I can't tell from this record that he did not
7 decide, regardless of the advice that you had given him,
8 to go ahead answer these questions.

9 MR. WALLACH: But you see they are using this
10 as--

11 THE COURT: It is certainly conceivable, if
12 you had raised the point before Judge MacMahon, that he
13 might have decided not to answer, but I do not know
14 that. I think it is certainly conceivable that he de-
15 sired to answer the question and di so.

16 I can't reach any conclusion one way or the
17 other.

18 MR. WALLACH: Your Honor, I ask you again to
19 please strike it from this record.

20 THE COURT: I am sorry, Mr. Wallach, I don't
21 think I can.

22 Any remaining questions about the charge, Mr.
23 Wallach?

24 MR. WALLACH: No, your Honor, there are no
25

1 remaining questions about the charge.

2 THE COURT: I thought I would perhaps head
3 off a question by the jury by telling them what "con-
4 tumaciously" means. They will have the indictment,
5 and somebody may ask me what it means, and I will read
6 it to them anyway. I can't tell yet what I am going
7 to say.

8 Well, I am advised that the dictionary says
9 "contumaciously" means wilful contempt of court, so
10 perhaps I should say "contumaciously" means "contemptuous-
11 ly. I will previously have described what "wilful" and
12 "unlawful" and "knowingly" means, and I will say that
13 "contumaciously" means contemptuously.

14 Does that suit everybody?

15 MR. WALLACH: Yes, that is the accepted mean-
16 ing of the word.

17 THE COURT: All right.

18 (In open court; jury in the box)

19 THE COURT: Good morning, ladies and gentle-
20 ment.

21 JURORS: Good morning.

22 THE COURT: Mr. McCarthy.

23 MR. MCCARTHY: Your Honor, Mr. Foreman Green,
24 ladies and gentlemen of the jury:

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1 You will remember yesterday when I made my
2 opening statement that I said this case would be relat-
3 ively brief; that is in fact what happened, and it is
4 quite understandable that the government's proof here is
5 quite powerful.

6 There was no need to have a parade of wit-
7 nesses coming to the stand and testifying about what
8 they remember happened before the grand jury, or what
9 they remember happened before Judge MacMahon. We had
10 something better than that: we had the best possible
11 proof, namely, the transcripts of the proceedings be-
12 fore the grand jury and before Judge MacMahon. We had
13 taken down as they happened the words that were spoken
14 before the Grand Jury and before Judge MacMahon. There
15 is really no way of getting around what is found here in
16 black and white and--

17 MR. WALLACH: I am going to object to this.
18 He is not telling the jury that they are to decide the
19 facts.

20 I object to that, your Honor; that is not the
21 function of a summation.

22 THE COURT: No, I think it is all right, Mr.
23 Wallach.

24 MR. McCARTHY: Now what does the evidence
25 indicate happened in this case?

1 First, everything that occurred here occurred
2 in the context of the grand jury investigation of the
3 syndicated gambling activities of/Tony Salerno and Fish
4 Cafaro.

5 The first thing that happened was the issuance
6 of a court order--that is government's exhibit 1. You
7 will have this with you when you go into the jury room.
8 This court order was first shown and read to the defend-
9 ant, Mr. Morales, on March 24, 1977.

10 He then appeared before the grand jury on
11 April 28th, more than a month after he had first been
12 told of the court order.

13 This order directed that he testify before the
14 grand jury, and it granted him immunity.

15 Now what happened when Mr. Morales appeared
16 before the grand jury? He was asked three questions.

17 What were those questions?

18 Those questions are contained in government's
19 exhibit 2.

20 The first one is:

21 "I ask you whether you know a man by the name
22 of Vincent Cafaro?"

23 The second question is:

24 "Have you ever worked in a policy operation
25 with Vincent Cafaro?"

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1 And the third question is:

2 "Have you ever discussed a policy gambling
3 operation by Anthony Salerno at 2226 First
4 Avenue?"

5 Now the language "policy operation" is what
6 is know as the numbers racket--

7 MR. WALLACH: I object to the use of the
8 word "racket".

9 THE COURT: Overruled.

10 MR. MCCARTHY: What did the defendant do when
11 he was asked these questions?

12 He thumbed his nose at the grand jury and at
13 a court order. He refused to answer any of these ques-
14 tions. Because the grand jury was investigating the
15 allegedly illegal gambling activities of Fat Tony
16 Salerno and Fish Cafaro, these questions were directly
17 related to what the grand jury was looking into.

18 If Mr. Morales had any information to give
19 in response to these questions, it would have gone to
20 the heart of the matter that the grand jury was in-
21 vestigating.

22 MR. WALLACH: I object to that, your Honor;
23 that is not the evidence.

24 THE COURT: Overruled.

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1
2 Ladies and gentlemen, as I told you before, and
3 I will remind you once again in my charge, the evidence
4 is what is in evidence--not what the lawyers say is in
5 evidence, not what I say is in evidence. The evidence
6 you can determine yourself and from your recollection of
7 what you have heard, and what you will see from the
8 documents which you wish to have with you in the jury
9 room.

10 MR. McCARTHY: Maybe Mr. Moarles did not
11 answer these questions because he thought he could get
12 away with it; Maybe--

13 MR. WALLACH: Objection to that, your Honor.
14 Your Honor, he is--

15 THE COURT: This is a proper summation, Mr.
16 Wallach.

17 MR. McCARTHY: Maybe Mr. Morales did not
18 answer these questions because he thought he was differ-
19 ent than you or I; that he did not have to obey an
20 order of the court, that he did not have to testify.
21 Maybe Mr. Morales did not answer these questions be-
22 cause he thought the whole matter would get lost in the
23 shuffle, that it wasn't important; or maybe he didn't
24 answer these questions because he thought he might be
25 able to protect the people who were being investigated

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1 by the grand jury.

2 We will never know, but what we do know is
3 that Mr. Morales, in not answering these questions, knew
4 what he was doing.

5 When Mr. Wallach, Mr. Morales' attorney, made
6 his opening remarks, he said the issue in this case is
7 intent; he waived and conceded any other issues--

8 MR. WALLACH: I object to that. I did not
9 waive or concede anything, your Honor. I said that is
10 the issue in this case. That did not mean that there
11 weren't any other issues. I had a right to make an
12 opening as long as the Court would permit me or not make
13 an opening at all.

14 He is using me against Mr. Morales.

15 THE COURT: Overruled.

16 MR. MCCARTHY: Mr. Wallach did say that the
17 issue in this case was intent, that Mr. Morales knowingly
18 and wilfully disobeyed a court order.

19 If that is the issue in this case, then you
20 have very little to deliberate about. The evidence
21 clearly shows that Mr. Morales understood what he was
22 being told to do, that he refused to do it deliberately,
23 purposefully, without any mistake.

24 Mr. Morales was first told by Judge Wyatt's

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1 order in March of 1977. He did not appear before
2 the grand jury and refuse to testify until April 28th--
3 more than a month after he knew of Judge Wyatt's order.

4 Mr. Morales had more than a month during which
5 to think about what he was being ordered to do. He
6 had an opportunity, or many opportunities, during that
7 month to consult with anyone--his attorney or friends,
8 or anyone, about whether he would testify or what type
9 of testimony he would give if he did testify.

10 When Mr. Morales appeared before the grand
11 jury, he was asked if he understood his obligations
12 under the order of the court.

13 He was asked if he understood that he had been
14 granted immunity by the order of the court.

15 To the first question, Mr. Morales answered
16 "Yes".

17 To the second question, he answered "I under-
18 stand."

19 There is no evidence anywhere in this record
20 about any confusion, about any doubt, about any misunder-
21 standing by Mr. Morales.

22 When he appeared subsequently before Judge Mac-
23 Mahon, the judge asked him a number of questions to
24 determine whether what he was doing was intentional, pur-
25

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1 poseful, without any mistake.

2 That question was asked in a number of differ-
3 ent ways. Every response that Mr. Morales gave be-
4 fore Judge MacMahon, every response which he gave be-
5 fore the grand jury, was very simple, was very direct;
6 there was no doubt from those responses that he under-
7 stood what he was doing. 8 times he responded by say-
8 ing "I do", "I understand", "That is right", "I know
9 what I am doing".

10 From this evidence there is no question but
11 that Mr. Morales had decided deliberately to stonewall
12 the grand jury, and that is a fact, what he did when he
13 refused to answer the questions posed to him before the
14 grand jury, despite the order of Judge Wyatt.

15 Thank you very much.

16 MR. WALLACH: May it please your Honor, members
17 of the jury, by now you know, even though we had a brief
18 adjourn in this case, that I represent Mr. Morales.
19 However you may feel about the representation that he
20 has been getting, or the evidence that has been put in,
21 the point remains that there is one judge of the facts
22 in this case--and that is going to be the jury.

23 I am not going to make any speeches about the
24 grand jury system. I am not going to ask you to be
25

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1 sympathetic. First, I can't; it is against the law--
2 and you are not here to give my client condolences, so
3 I am going to be brief.

4 My client, it is true, was called before a
5 grand jury, and the exhibits show before the grand jury
6 that he was there with the government prosecutor. I
7 am not saying that the whole thing should be disregarded
8 because I or a battery of lawyers couldn't be present
9 before the grand jury. That is not the law, and it is
10 not allowed, and it is a good thing because the grand
11 jury could not get down to hearing cases, but he was there
12 alone with the prosecutor. There was a lawyer in the
13 hallway--that's true--but he was alone before the grand
14 jury.

15 Then there came a time that the prosecutor
16 just told you, about immunity--and I am not here to
17 question immunity; that is a question of law--I can't
18 discuss that and I will not discuss it. I won't even
19 discuss it before the judge, for whom I have the great-
20 est respect, but that is not relevant in this case.

21 He was then taken before another judge and
22 asked certain questions.

23 Now at the outset I want to be very clear--
24 Mr. Morales is not on trial for being part of the racket
25

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1 or the policy racket. Policy is a racket that is
2 conducted privately, and it is a sugar-coated form
3 of taxation when the State conducts it--so I am not here
4 to defend the policy racket.

5 This is not a racket case. Mr. Cafar and
6 Mr. Salerno are no part of this case, and whatever bus-
7 iness the government has in investigating those individ-
8 uals is another case. I am not here to defend them, but
9 I am here to defend Mr. Morales.

10 With the overwhelming evidence I am supposed
11 to get at and convince you--well, to begin with, I don't
12 believe that juries in this day and age are convinced
13 by lawyers; they are convinced by facts. Because they
14 are the only ones in this entire universe, and if there
15 is more than one universe, in any universe, here and now,
16 who stand between the prosecution and my client. And
17 you don't have to account to anybody. You can convict
18 my client in one second flat, and nobody can go to you
19 in the hallway and say to you "Why did you do that?"

20 Nobody can say to you "Give us your reasons"

21 Now let's get to the interlude when my client
22 appeared before another judge who questioned him about
23 whether he understood, and then committed him or found
24 him guilty of contempt. That is not before you either.

1 The prosecutor use that to show that my client under-
2 stood everything that was going on--that was the pur-
3 pose of that.

4 The fact that another judge held him for con-
5 tempt--I believe it is called civil contempt--is not
6 binding--

7 MR. McCARTHY: Objection, your Honor; there is
8 no evidence anywhere in the record as to what counsel
9 is referring to.

10 THE COURT: Yes.

11 MR. WALLACH: All right, I will withdraw it--
12 I am sorry.

13 The fact that he was before another judge,
14 whatever that judge decided, is not before you. He is
15 not on trial for that; but I will tell you what he is
16 on trial for. He is on trial for wilfully, knowingly,
17 contumaciously, contemptuously, deliberately, intention-
18 ally thwarting the investigation.

19 As I said to you yesterday, just like a few
20 minutes ago, the issue in this case is intent.

21 Now intent--I don't know how many of you sat
22 on juries. Of course intent cannot be the product of
23 a lobotomy conducted in the court room--they take out
24 your intellect and they say to the jury, "See, inrelect,

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1 his mind, he intended it."

2 You may be hearing from the government again
3 that facts can be inferred from the record, what was
4 said, and that's all we have to go by; but he was alone
5 in the grand jury room--that is the law--with the prosecut-
6 or. You are going to be given all the papers, all the
7 minutes of these proceedings, because they are in evid-
8 ence, and I am going to ask you, anything in there which
9 shows a reason other than being wilful, other than
10 being deliberate, other than being intentional--anything
11 there--well, that accrues to his benefit, because cer-
12 tainly in the United States, in this day and age--I
13 don't know how it is going to be tomorrow--when author-
14 ities call you in, you must answer questions--it is just
15 not that simple.

16 Now I am not saying that a witness who has
17 been given immunity doesn't have to answer questions,
18 but I will say this, they capitalize on the fact that
19 he was brought over here before a judge, and there was
20 a proceeding, and the judge asked him questions, but
21 there wasn't a jury there. So whatever the consequences
22 of that particular phase of the proceeding were, there
23 was no jury over there to decide whether it was in-
24 tentional or deliberate or wilful and whether he wanted
25 to be contemptuous.

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1
2 That is the issue over here, and anything in
3 that record which shows that it was not so, that accrues
4 to his benefit.

5 I want to repeat that we were before a judge;
6 he did not have a jury of 12 people, or to do it the
7 way they teach in law school--12 of his peers--whatever
8 that may mean.

9 That is the issue before this body.

10 You can very easily on the way out take a
11 look at those minutes and say "Let's go back; he is
12 guilty; the papers show that." But those papers symbol-
13 ize my client alone in the grand jury, being questioned
14 by a prosecutor, before another judge, submitting to
15 the court and answering the questions; but again how
16 else do we get this before a jury?

17 I challenge the prosecutor to tell me how
18 else we could have gotten this before a jury.

19 Now you are going to decide that on the evid-
20 ence that he produced; that my client was there; on the
21 evidence that shows he went before the judge where he
22 did not say "I don't know what I am talking about; I am
23 a mental case; there is something wrong with me; I
24 don't feel well."

25 He wanted to test the issue, and it is in your

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1 lap now.

2 That is about all I have to say.

3 Thank you.

4 THE COURT: Anything else, Mr. McCarthy?

5 MR. McCARTHY: Yes, your Honor--briefly.

6 Mr. Wallach talked about this case before you
7 as a jury. You may be asking yourself that question.
8 Ladies and gentlemen of the jury, I am proud to say that
9 in our system any person, any defendant, no matter what
10 crime he is charged with, no matter how overwhelming
11 the evidence of guilt may be, has the right to have the
12 government prove its case beyond a reasonable doubt,
13 has a right to have a jury trial, as this defendant is
14 having in this court room yesterday and today.

15 The government has met the challenge of the
16 defendant and has proved beyond a reasonable doubt the
17 guilt of the defendant.

18 Mr. Wallach also discussed what went on before
19 the grand jury. The grand jury is another type of
20 jury which conducts investigations to determine whether
21 crimes have been committed. It does that in part by
22 taking testimony.

23 When the defendant appeared before the grand jury he
24 had well over a month to consider what he would do when
25

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1 he got before the grand jury.

2 As Mr. Wallach said, he had his attorney out-
3 side the grand jury room. The Court will be instruct-
4 ing you in a few minutes on the law to be applied in
5 this case. Of course what the Court says is the law
6 will govern--the law that you are to apply to the facts
7 in this case, and I expect that you will hear from the
8 Court that any person before the grand jury has a right
9 at any time to leave the grand jury room when asked a
10 question and consult with his attorney outside the grand
11 jury room. The defendant in this case had that right.

12 The defendant appeared before Judge MacMahon;
13 he had an opportunity then, in answer the Court's ques-
14 tions, to answer those questions any way that he wanted
15 to. He answered them as the answers are reflected in
16 government's exhibit 3. Those are the words he said
17 to the Judge's questions.

18 I ask you to recognize as well that the laws
19 of this country are not self-executing; they must be en-
20 forced by a court and by jurors.

21 It is your privilege--

22 MR. WALLACH: Objection, your Honor. As I
23 understand the function of the jury it is not to enforce
24 the law; that is the function of a prosecutor, and the

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1 jury has to decide the facts--not enforce the law.

2 MR. McCARTHY: May I continue?

3 THE COURT: I think that is all you need to
4 say on that, Mr. McCarthy.

5 MR. McCARTHY: I ask you to listen carefully
6 to what the Court will instruct you on the law, and to
7 apply that to the evidence, the only evidence that you
8 have before you in this case, and if you do, I trust
9 that you will find that the defendant, Mr. Moarles, is
10 guilty as charged.

11 Thank you very much.

12 MR. WALLACH: Excuse me, your Honor, could
13 we have a few minutes' recess?

14 THE COURT: All right, ladies and gentlemen,
15 we will take a short recess.

16 (A short recess)

17 (Following in the absence of the jury)

18 THE COURT: What I propose to do, since I
19 assume the jury will want them anyway, is to hand to
20 them, as soon as they retire, the indictment, and also
21 exhibits 1, 2 and 3.

22 Is there any problem about that?

23 MR. WALLACH: Your Honor, I respectfully ob-
24 ject to giving them the indictment; it is just an ac-
25

1 cusation.

2 THE COURT: All right; I will read it to
3 them; of course if they ask for it I will give it to
4 them but I wouldn't volunteer it.

5 Is it agreeable to furnish them with the ex-
6 hibits?

7 MR. WALLACH: Sure.

8 THE COURT: All right, so you will have copies
9 of the exhibits that we can send in after they retire.

10 MR. McCARTHY: Yes.

11 THE COURT: That is exhibits 1, 2 and 3.

12 MR. McCARTHY: Yes.

13 THE COURT: What about the stipulation?

14 MR. McCARTHY: "I don't think we need that.

15 THE COURT: You don't need that.

16 MR. McCARTHY: No.

17 THE COURT: All right, will you bring the
18 jury in.

19 (Jury in the box)

20 (The charge then follows)

21
22
23
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E X H I B I T P A G E

<u>Number</u>	<u>Description of exhibit</u>	<u>Page</u>
Court's exhibit 1	Prior proceedings	7
Court's exhibit 2	Stipulation of counsel	56
Gov't exhibit 1	Judge Wyatt's order	56
Gov't exhibit 2	Grand jury testimony of Louis Morales on April 28, 1977	56
Gov't exhibit 3	Transcript of hearing before Judge MacMahon on April 28, 1977	72
Court's exhibit 3	Grand Jury proceedings held on March 17, 1977	72

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COURT'S CHARGE AND VERDICT

CHARGE OF THE COURT

1
2 THE COURT: Mr. Green, ladies and gentlemen,
3 we have now come to that part of the case where the evid-
4 ence is in, the lawyers have presented their final
5 arguments, and you are about to exercise your role,
6 that is, to pass upon and decide the factual issues that
7 are in this case.

8 It is your responsibility to reach a just verdict
9 in the determination of the charges against the defend-
10 ant. I know that you will deliberate toward reaching
11 a verdict fairly, honestly and conscientiously.

12 I want to impress upon you that you are the sole
13 and exclusive judges. You pass upon the evidence; you
14 resolve such conflicts, if any, which are in the evid-
15 ence; you draw such reasonable inferences as may be
16 warranted by the evidence.

17 My function is to instruct you on the law ap-
18 plicable to the case. It is your sworn duty to accept
19 the law as I say it to you in these instructions--not
20 what the lawyers may have said the law is--and to apply
21 it to the facts as you find the facts to be.

22 As I have told you with respect to any fact mat-
23 ter, it is your recollection and yours alone that gov-
24 erns. Anything that counsel may have said with respect
25

1 to matters of evidence, whether during the trial or
2 in argument, is not to be substituted for your own re-
3 collection of the evidence. Also anything that I may
4 have said or may say during these instructions as to any
5 matters of evidence is not to be taken in place of your
6 own view of the evidence.

7 As I have instructed you also, the case must be
8 decided upon the matters received in evidence. You
9 may not take into account or consider in any way any
10 extraneous matters, such as anything outside this court
11 room, or in the jury room, or in the court house or any
12 other place--only the evidence presented to you may be
13 considered by you.

14 The fact that the government is a party, that
15 is, that the prosecution is brought in the name of the
16 United States entitled it to no greater consideration
17 than that accorded to the defendant.

18 By the same token, it is entitled to no less con-
19 sideration.

20 There are certain general principles of law,
21 most of which I have already stated to you, which I
22 want to repeat.

23 First, the indictment is simply an accusation,
24 a charge. It is not evidence or proof of anything.

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1
2 It is merely a means utilized by the government to bring
3 a defendant before the Court, and you will give no weight
4 to the fact that an indictment has been returned against
5 this defendant.

6 The defendant has pleaded not guilty; therefore
7 the government has the burden of establishing and proving
8 beyond a reasonable doubt by competent evidence the
9 charges made against him.

10 Whether this burden is sustained does not depend
11 upon the quantity of the evidence, but rather on the
12 nature and the quality of the evidence. It is a burden
13 that never shifts; it remains upon the government at all
14 times.

15 The defendant does not have to prove his in-
16 nocence. On the contrary, the defendant is presumed
17 to be innocent of the charge contained in the indict-
18 ment, and the government must prove the defendant's
19 guilt beyond a reasonable doubt. The presumption of
20 innocence was in the defendant's favor when the trial
21 began; it was present during the trial; it is in his
22 favor now, and it remains in his favor during the course
23 of your deliberations in the jury room. It is removed
24 only if you are satisfied that the government has sus-
25 tained its burden of proving beyond a reasonable doubt

1 the guilt of the defendant.

2 It is for this reason that the defendant does
3 not need to take the witness stand. The fact is that
4 the defendant in this case has not testified in his own
5 behalf. The Constitution and the laws of the United
6 States provide that in any criminal matter a defendant
7 is under no obligation to come forward to testify or to
8 produce any evidence because the burden of proving a
9 violation is solely and exclusively on the prosecution.
10 So you may draw no inference from the fact that the
11 defendant did not testify or produce any evidence; and
12 in fact you must not speculate upon it or consider it
13 in any way in your deliberations.

14 A defendant has the absolute right not to make
15 any defense, and to rely on the government's burden to
16 prove him guilty beyond a reasonable doubt.

17 What is "reasonable doubt"? A reasonable doubt
18 is such a doubt as would cause you to hesitate in a
19 matter of importance in your own lives. It is a doubt
20 which a reasonable person has after carefully weighing
21 all the evidence. It is one which appeals to your
22 reason, your judgment, your own experience. It is not
23 caprice, speculation, whim. It is not an excuse to
24 avoid the performance of an unpleasant duty. Speculat-

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ive or imaginary qualms or misgivings are not reasonable doubts.

It is not necessary for the government to prove the guilt of the defendant to a mathematical certainty or beyond all possible doubt. It is practically impossible for a person today in this world of ours to be absolutely and completely convinced of any controverted fact which by its very nature is not susceptible of mathematical certainty. In consequence, the law in a criminal case like this is that it is enough if proof that the defendant is guilty is established beyond a reasonable doubt, not beyond all possible doubt.

If after a fair and impartial consideration of all the evidence in the case, or the lack of it, you can honestly say that you have such a doubt as would cause a prudent person to hesitate before acting in matters of importance to himself, then you have a reasonable doubt and in that circumstance it is your duty to acquit.

On the other hand, if after a fair and impartial consideration of all the evidence you can honestly say you have such an abiding conviction of the guilt of the defendant that you would be willing to act upon this conviction in important and weighty matters in the personal affairs of your own life, then you have

no reasonable doubt, and in that circumstance you should convict. A reasonable doubt may arise not only from the evidence presented but also from the lack of evidence, since the burden, as I have told you, is always on the government to prove the defendant guilty of every essential element of the crime charged beyond a reasonable doubt.

Now the defendant is charged with violating a section of the United States statutes, which reads as follows:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -

Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The indictment says:

"On or about April 28, 1977, in the Southern District of New York, Louis Morales, the defendant, having been ordered to testify by the Honorable Lloyd F. MacMahon, United States District Judge, pursuant to the lawful order of the Honorable Inzer B. Wyatt, United States District Judge, granting the defendant, Louis Morales,

1 "testimonial immunity and commanding him to
2 testify before a Grand Jury for the Southern
3 District of New York 'as to all matters
4 about which he may be interrogated before
5 said grand jury,' unlawfully, knowingly,
6 wilfully and contumaciously did disobey
7 and resist said lawful order by refusing
8 to answer the following questions posed
9 before the Grand Jury:

- 10 1. Do you know a man by the name of
11 Vincent Cafaro?
12 2. Have you ever worked in a policy
13 operation with Vincent Cafaro?
14 3. Have you ever discussed a policy
15 gambling operation supervised by
16 Anthony Salerno at 2226 First Avenue?"

17 There are three elements which you must find
18 that the government has proved beyond a reasonable doubt
19 as to the defendant before you can convict the defend-
20 ant.

21 First, that the Court, namely, Judge Wyatt,
22 gave the order an order directing him to answer ques-
23 tions and testify.

24 Second, that the defendant disobeyed the order.

25 Third, that the defendant acted wilfully and

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1 knowingly in disobeying the court order.

2
3 Concerning the first element relating to the giv-
4 ing of an order by Judge Wyatt, I instruct you that if
5 you find from the evidence that Judge Wyatt gave the
6 order, as a matter of law that order was lawful and
7 proper in every respect.

8 I instruct you that that order, if you find that
9 it was given, did not violate any constitutional or
10 other legal rights of the defendant.

11 The second element, that is, that the defend-
12 ant disobeyed the order; and, third, that the defend-
13 ant acted wilfully and knowingly in disobeying the
14 court order.

15 The second element, I repeat, you must find
16 proved in order to convict, that the defendant dis-
17 obeyed Judge Wyatt's order; and the third element,
18 that he did so wilfully and knowingly.

19 What is meant by "wilfully and knowingly"?

20 You must be satisfied beyond a reasonable doubt
21 that the defendant knew what he was doing, and that he
22 did it deliberately and voluntarily and not because of
23 a mistake, an accident, negligence or some other in-
24 nocent reason.

25 An act is wilful if it is done knowingly and

1 deliberately with an unlawful motive. "Unlawful" means
2 contrary to law.

3 In determining whether the defendant has acted
4 knowingly and wilfully it is not necessary that the
5 defendant knew that he was violating any particular
6 law. It is sufficient if you are convinced beyond a
7 reasonable doubt that the defendant was aware of the
8 general unlawful nature of his act.

9 The word "contumaciously" as used in the in-
10 dictment means contemptuously, that is, a wilful con-
11 tempt of court.

12 You will recall that the defendant, when appear-
13 ing before the grand jury on April 28th, 1977, stated
14 that he declined to answer certain questions on the
15 grounds that it would tend to incriminate him.

16 You will also recall that Judge Wyatt granted
17 the defendant immunity from prosecution except for
18 perjury, and that defendant stated before Judge Mac-
19 Mahon that he understood that he had been given im-
20 munity.

21 I instruct you that the privilege against self-
22 incrimination was not a valid reason for refusing to
23 testify before the grand jury after the judge had
24 granted the defendant immunity.

1 A witness before a grand jury cannot refuse to
2 obey a court order to testify because of certain per-
3 sonal reasons.

4 A witness cannot make his own private determin-
5 ations. He can submit legal arguments as well as any
6 asserted personal argument, or any argument whatever
7 to the court. Once the court has ruled against those
8 arguments a witness is required to obey the court's
9 order. He cannot simply go by his own private de-
10 termination.

11 Let me explain to you briefly how a grand jury
12 works. For the protection of all concerned, a grand
13 jury proceeding is a secret proceeding. The only
14 people permitted in the grand jury room by law are the
15 members of the grand jury, the grand jury reporter who
16 transcribes what goes on in the grand jury; the witness
17 and an Assistant United States Attorney or other prosecut-
18 or who questions the witness on behalf of the grand
19 jury.

20 The witness has a right to an attorney while he
21 is before the grand jury but his attorney may not be
22 present with him in the grand jury room itself. His
23 attorney must wait outside the grand jury room, but
24 the witness can consult with his attorney at any time
25

11

during the questioning by simply asking to go outside the grand jury room and consult with his attorney outside.

Under your oath as jurors you are not to be guided or swayed in any manner by sympathy in your deliberations or in your discussions. You are to be guided solely by the evidence in the case.

The crucial question that you must ask yourselves as you look at the evidence is, what is the truth? It is your task to find out what the truth is, and justice triumphs only if you do so.

You are to determine the guilt or innocence of the defendant solely on the basis of the evidence or the lack of evidence before you and subject to the law as I have charged you.

If you have a reasonable doubt as to the defendant's guilt, you should not hesitate for any reason to find a verdict of acquittal.

On the other hand, if you should find that the government has met its responsibility in proving the defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

Now a few final instructions. During the trial

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1 from time to time there have been objections made by
2 one or the other of the parties. It is the duty of a
3 lawyer, as I am sure you recognize, to object when he
4 believes he should, and you should not be prejudiced
5 in any way against anybody because of an objection made
6 or because of my ruling on an objection.
7

8 As I told you at the outset, you cannot allow a
9 consideration of the punishment which may be inflicted
10 upon the defendant if convicted to influence your verd-
11 ict in any way, or to enter into your deliberations.
12 The duty of imposing sentence rests exclusively with
13 me.

14 Your function is to weigh the evidence and de-
15 termine the guilt or innocence solely on the basis of
16 the evidence and the law as I have given it to you.

17 You must not be influenced by any assumption,
18 conjecture or sympathy or any inference not warranted
19 by the facts.

20 The purpose of your deliberations is to exchange
21 views with your fellow jurors, to discuss and consider
22 the evidence, the listen to each other's arguments,
23 to present your own views, to reach a unanimous verd-
24 ict as to the defendant based solely on the evidence,
25 if you can do so without violence to your own individ-

al judgment.

Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence in the case and after a discussion with your fellow jurors. Do not hesitate to re-examine your views and to change your opinion when after a discussion it appears that you are in error. But if after careful consideration of all the evidence in the case, and after a careful consideration of the arguments of your fellow jurors you still have a conscientious view which differs from the rest of the jury, you are not to yield your view simply because you are outnumbered.

After you retire to the jury room, Mr. Green, to deliberate, we will send in to you the exhibits and anything else you want, such as the indictment or anything else; please, Mr. Green, send me a note telling me what you want, give your note to the Marshal and we will do everything we can to help you.

In communicating with me, Mr. Green, do not in any way indicate what your vote may be at that time.

Any verdict which you return must be unanimous. Counsel.

(Following at the side bar)

MR. WALLACH: Your Honor, I am constrained to

1 take exception to where you said--to the effect about
2 the order, that in effect he is bound by the order
3 and he cannot go beyond it. I can't paraphrase cor-
4 rectly your Honor's statement, but it dealt with the
5 fact generally that the jury was bound to find him
6 guilty if he disobeyed Judge MacMahon's order.

7 THE COURT: Judge Wyatt's order.

8 MR. MCCARTHY: I think it was Judge Wyatt's
9 order.

10 MR. WALLACH: Judge Wyatt's order--I am sorry.

11 THE COURT: Well, I think my charge was proper.
12 I, of course, note your exception.

13 MR. WALLACH: Thank you, your Honor.

14 THE COURT: I think it would have been more ap-
15 propriate if you had raised it earlier, but I expect
16 that if you had raised it earlier I would have given
17 the charge anyway.

18 Anything else?

19 MR. WALLACH: That is all, your Honor; thank
20 you.

21 (In open court)

22 THE COURT: Ladies and gentlemen, your oath
23 sums up your duty: without fear or favor to anyone you
24 will truly trye the issues between this defendant and
25

1 the government, based solely upon the evidence and my
2 instructions as to the law.

3 This is an important case to the government; it
4 is important to the defendant.

5 All right, do you want to excuse the alternates?

6 (The clerk hands to the Court)

7 THE COURT: Mr. Perl and Mr. Lopez, at this
8 point we will excuse you. We want to thank you for
9 your patience and your attention.

10 You are excused, and you should return to the
11 central jury room.

12 (Whereupon the two alternates left the
13 court room).

14 (Deputy Marshal sworn by the Clerk)

15 THE COURT: All right, ladies and gentlemen,
16 you may retire.

17 (Whereupon the jury left the court room
18 at 11:45 am).

19 THE COURT: Mr. Alonzo, will you give the ex-
20 hibits to the Marshal.

21 (Exhibits sent in to the jury with the
22 Marshal)

23 (Whereupon at 12:30 pm the jury returned to
24 the court room).

1 THE CLERK: Members of the jury, please answer
2 as your name is called.

3 (Roll of jurors called by the Clerk; all
4 present).

5 THE CLERK: Mr. Foreman, have you agreed upon a
6 verdict?

7 THE FOREMAN: We have.

8 THE CLERK: How do you find the defendant,
9 Louis Morales, as charged?

10 THE FOREMAN: Guilty.

11 THE CLERK: Guilty?

12 THE FOREMAN: Yes.

13 THE CLERK: Members of the jury, listen to your
14 verdict as it stands recorded: you say you find the def-
15 endant, Louis Morales, guilty as charged, and so say
16 you all.

17 (Jurors nod their heads)

18 MR. WALLACH: Your Honor, I respectfully re-
19 quest the jury be polled.

20 THE COURT: All right.

21 THE CLERK: Members of the jury, listen to your
22 verdict as it stands recorded: you say you find the
23 defendant, Louis Morales, guilty as charged.

24 (Whereupon each juror answered affirmatively)

1 THE CLERK: And so say you all.

2 THE COURT: All right, ladies and gentlemen,
3 I want to thank you for your attention and your pat-
4 ience. We all know that service on a jury is frequent-
5 ly inconvenient, but it is very important. Our system
6 of justice relies very heavily upon good citizens tak-
7 ing the time to serve on juries, as you have done.
8

9 Thank you very much; you are excused.

10 (Whereupon the jury left the court room)

11 THE COURT: Mr. Wallach, do you have any motions?

12 MR. WALLACH: Your Honor, I ask that your Honor
13 continue my client on parole--I believe he is out on his
14 own recognizance. I do not think there is any question
15 about this man's appearance. He appeared before the
16 grand jury. He responded at all times when it was
17 necessary. This is not a crime of violence. I also
18 would like to point out under the statute, your Honor,
19 the other provisions of the Code, the consequences are
20 entirely up to your Honor, and that it is in the dis-
21 junctive--there is a fine or imprisonment. I don't
22 know what your Honor is going to do.

23 I do know that my client has no prior con-
24 victions, and while this has been a short trial, your
25 Honor the issues are very difficult--it was a very

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1 difficult trial, in my opinion, because of the nature
2 of the charges. This man, of course, will take an
3 appeal, hopes to take an appeal, for whatever it is
4 worth. I do not know what your Honor is going to do
5 on sentencing. I am going to urge leniency. This
6 man has every reason to be here. He is not a menace to
7 the community, your Honor, and so far as the crime goes,
8 I couldn't point this out to the jury--I will say this
9 with the greatest respect to your Honor as well as to
10 the institutions of this country, and there is some-
11 thing about not being an informer. Whether the person
12 is right or wrong, that is a matter for his own decis-
13 ion to make. A lawyer can't advise him. It is a
14 moral choice.

15 Your Honor knows, as the prosecutor well knows,
16 this is a highly controversial problem--the role of
17 the grand jury, the role of witnesses before the grand
18 jury. I know the government is going to say that he
19 impeded the investigation. Mr. Salerno was indicted.
20 There are two indictments--and Mr. Cafaro was indicted.
21 I don't represent him. There are others in that case.
22 They have had wire-tapping; they have had their in-
23 vestigation.

24 Mr. Morales, for whatever reason is personal to
25

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1 himself--it may not be a legal reason, it may not be
2 a constitutional reason. Judge Black once said "You
3 can't give immunity to anybody; rewrite the Fifth Amend-
4 ment and you will have no problem."

5 This is not a typical crime where a person comes
6 before your Honor in a mail fraud, embezzlement, hijack-
7 ing, narcotics or even gambling.

8 Your Honor, there will be an appeal. I ask
9 your Honor to continue him on--to continue his present
10 status. He has every reason to be here. I also want
11 to point out, your Honor--I don't remember the practice,
12 I am a little nervous--I personally have a little prob-
13 lem. I go away at the end of August to the end of
14 September for health reasons, with my family. I imag-
15 ine it will take almost two months before a probation
16 report will be given to your Honor.

17 THE COURT: No, I do not think it will take that
18 long.

19 MR. WALLACH: I don't know the practice; I know
20 in the Eastern District--

21 THE COURT: It takes about four or five weeks.

22 MR. WALLACH: Your Honor, I ask that he be
23 continued. He is not a menace to the community. He
24 owns a business.

25 THE COURT: What about it, Mr. McCarthy?

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2 MR. MCCARTHY: Your Honor, the government would
3 ask that the defendant be remanded to the United States
4 Marshal, and there are two reasons for our application:

5 First, based on the statute, 18 U. S. Code,
6 Section 3148, which provides that a person who has
7 been convicted of an offense and who is awaiting sen-
8 tencing, may be ordered detained if it appears that an
9 appeal is frivolous--and in this particular case we
10 would urge upon your Honor that any appeal would be
11 frivolous.

12 The case was very short, simple and direct.
13 There is no substantial ground for taking any appeal,
14 and on that basis, first, we would ask that the defend-
15 ant be remanded to the United States Marshal.

16 The second reason has to do with, in part with
17 what Mr. Wallach said, about the unwillingness of his
18 client to testify against Mr. Salerno and Mr. Cafaro,
19 among others. I think it is a realistic analysis in
20 this case that Mr. Morales has been willing to be held
21 in civil contempt, to go to trial, and now be found
22 guilty of criminal contempt in order to protect Mr.
23 Cafaro and Mr. Salerno.

24 I think it is a reasonable inference if he is
25 willing to do that thus far, that he would be willing

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1 to take further steps, including, if necessary, fleeing
2 the jurisdiction, and we think that that does create a
3 problem with respect to his returning and being pres-
4 ent at a subsequent date.

5 As to this second ground, I request that he be
6 remanded to the United States Marshal.

7 MR. WALLACH: May I have a second, your Honor,
8 to speak to my client.

9 (Mr. Wallach confers with the defendant
10 off the record)

11 MR. WALLACH: Your Honor, the defendant is mar-
12 ried. I just wanted to make sure I am accurate. He
13 has 5 children. He lives in Manhattan. He lives
14 with his family.

15 THE COURT: Does he live with his family?

16 MR. WALLACH: You live with your family?

17 THE DEFENDANT: Yes.

18 MR. WALLACH: Not only that, he has a father
19 and mother who do not live far from here, on the East
20 Side, I believe. He was in the Air Force, your Honor.
21 He is a veteran.

22 Your Honor, believe me--

23 THE COURT: Did you say that he had some job
24 or business?

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1 MR. WALLACH: Yes; he owns a candy store.

2 THE DEFENDANT: A candy store.

3 MR. WALLACH: And he works in a grocery store.
4 Where is he going to run to, your Honor? He could
5 have run away before this.

6 THE COURT: All right; I am going to fix bail
7 at \$10,000 personal recognizance bond, secured by
8 \$2,000 in cash, and will fix a date for sentencing--

9 What is five weeks from today?

10 Do you have a date?

11 THE CLERK: August 16th, your Honor.

12 THE COURT: What day of the week is that?

13 MR. WALLACH: Tuesday.

14 THE COURT: All right; 9:30 am on August the
15 16th.

16 MR. WALLACH: Your Honor, can I have 24 hours
17 to get the bail posted?

18 (Conference off the record)

19 MR. WALLACH: Could he bring the bail tomorrow
20 morning?

21 THE COURT: All right, 10 o'clock tomorrow
22 morning.

23 MR. WALLACH: As I said before, your Honor, let's
24 look at it realistically, scientifically. I have
25

1 advised him your Honor could give him a jail term.
2 I have advised him your Honor can impose a fine. I
3 have advised him about probation. Why should he run
4 away?

5 THE COURT: I have taken that into account,
6 Mr. Wallach, thank you.

7 MR. WALLACH: Where do you execute the bond?
8 Where do we bring the cash?

9 (Mr. Rakoff confers with Mr. Wallach off
10 the record.)

11
12 (Adjourned to August 16th at 9:30 am
13 for sentence).
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SENTENCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA :

v. : 77 Cr. 335

LOUIS MORALES :

Defendant :

- - - - - x

August 24, 1977,
2 P.M.

Before:

Hon. Charles E. Stewart,
District Judge.

Appearances:

ROBERT B. FISKE, JR.,
United States Attorney
Southern District of New York,
By: Peter Sudler, Assistant U.S. Attorney.

ARNOLD E. WALLACH, ESQ.,
Attorney for Defendant.

(In open court)

THE CLERK: For sentencing, United States of America v. Louis Morales.

MR. SUDLER: Government is ready.

MR. WALLACH: Defendant is ready.

THE COURT: Yes, Mr. Wallach.

MR. WALLACH: Your Honor, there is a lot I could say, and yet I feel inadequate. In my opinion, for whatever it is worth, this is the most difficult part of any criminal action, the sentencing. I think it is the most important part because it determines a defendant's future.

Now, your Honor, there is no sense in going into the trial. My client was convicted by a jury of criminal contempt under Section 401, I believe, of subdivision A of Title 18. And I'm not rehashing anything, but prior to trial I moved to dismiss, and your Honor denied the motion, but the cases I read did say that contempt as a concept, as a judicial concept is something which is just part of the Court's jurisdiction and solely within the jurisdiction of the Court.

I hesitate to call it a crime. I know that Congress did. I hesitate to call it a crime, and I know the distinction between criminal and civil contempt.

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But, your Honor, from what little I know, and I know that this did not involve calling a person to make a confession as to his conscience or ideologies. From what little I have read, it seems to be a tradition in this country not to be an informer. I also know the Supreme Court --

THE COURT: Not to be what?

MR. WALLACH: An informer or cooperate with a grand jury. The Fifth Amendment came about from a gentleman in England who said he would not admit anything, he would not talk to anybody, it was against his conscience. I am not trying to escalate this case into a civil rights case, a case involving civil liberties. But, your Honor, people grow up in a certain environment and may know certain people. And whether their station in life is high or low or in between those ends of the gradient, they have to see these people, they have to meet these people and they have to answer to themselves as to whether they cooperated with the government or not.

Now, it is easy for the government to get up and say that we need evidence. How are we going to eradicate crime? We have grand juries to hand down indictments or exonerate people, and if we don't have witnesses we can't do that. I understand that argument

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2 very well, I understand it, Judge.

3 However, I would like to point out to your Honor
4 that still with people it is a matter of conscience,
5 irrespective of the subject matter of the inquiry. As
6 I said, I have read a little of the history of this country,
7 England, and not that Mr. Morales is going to occupy
8 a role as a martyr. He will not. He won't even be a footnote
9 or a semicolon in history, but the point remains it is not
10 the kind of offense, your Honor, that frankly it has
11 been my experience to encounter, like hijacking, gambling,
12 and what have you. It is still an offense which was created
13 by the courts -- and I am not disparaging the courts,
14 don't misunderstand me, but it is not the kind of offense
15 that was part of the common law of England in the sense
16 of law. It is something which the court had and needs to
17 preserve its own integrity and jurisdiction. I realize
18 that. Yet over here in this case, this man refused to talk,
19 and I don't want to go into why.

20 I can't do that because there may be future
21 proceedings.

22 I also understand from the United States Supreme
23 Court and from cases of other courts there was a phrase
24 in England that the king has a right to his subject's
25 evidence. That has been transposed in a republic, where

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2 they say that every citizen has to give evidence. Well,
3 I don't know about that, your Honor. It is really a clash
4 of fundamental views. As I said, I'm not attempting to
5 be defiant. Yet at the same time it is a matter of one's
6 own conscience and one has to face himself. Among the
7 great many people, they just don't want to cooperate.

8 As I said before, it is not something where
9 a defendant in a case like this or a witness gets paid,
10 makes money out of it. It is not a hijacking case,
11 it is not a gambling case.

12 I guess I am constrained also to say that Mr.
13 Tufaro and Mr. Salerno have been indicted. Maybe it would
14 have been easier to indict them if they had cooperative
15 witnesses. I don't know. I don't know what goes on with
16 the government or the grand jury.

17 I was once called by the grand jury to be
18 a witness and it was not an experience. Learned Hand
19 said that a lawsuit is a dreadful thing. He was right.
20 Being a witness can be pretty taxing.

21 So that's about all I can say, your Honor. I can
22 say this also: I read the Probation report. Frankly,
23 I'm not a sociologist or a penologist. I once took
24 a course in criminology and I should have paid more
25 attention to it, but there are certain things I want to

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2 call to your Honor's attention. They characterize my client
3 as being evasive. At the same time they admitted that he
4 would not discuss the charge or the conviction on the
5 advice of counsel. Well, it is my duty to tell him that.
6 I don't say he should have waived it. I don't think that
7 that could be scored against him. However, being evasive
8 is what puzzles me, because a person meets a Probation
9 officer, and depending on the person's background and
10 station in life, his whole growth, traditions, he may be
11 embarrassed, he may be abashed, he may feel alienated. He
12 just doesn't want to discuss whatever they wanted to
13 discuss. I don't see why they called him evasive.

14 THE COURT: I take that to mean just that he
15 was not willing to discuss the underlying circumstances.

16 MR. WALLACH: I am not a linguist or semanticist,
17 but I guess that's the point. They also say he lives in
18 a neighborhood and pays rent of 300-odd dollars a month.
19 They call it a high crime area, that they use drugs there.
20 Of course my client is not a high criminal or a low criminal
21 and he is not a drug addict. I don't know what a high
22 crime area is, Judge. I live in Flatbush, which is supposed
23 to be a very conservative section. Three years ago
24 a young man, whom I didn't know, for no apparent reason
25 took a shotgun and killed his father. I don't live in a

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2 high crime area. A lot of crimes are committed in very
3 exclusive areas, in New York City, Washington, D.C., and
4 I don't mean to be aggressive, your Honor, but Watergate oc-
5 curred in a very nice motel. I just don't think it is fair
6 to characterize an area as high crime. I don't go by
7 the statistics. I don't know where they got these statistics..
8 The fact people feel unsafe in the streets can also mean
9 that because the newspapers call it so. I cannot come
10 to a conclusion of that without a full understanding.

11 The other thing, your Honor, is unemployment.
12 That's another thing. I have been going to sentencing
13 for 33 years already. I have heard judges say to my
14 client, "Well, you don't work." It seems unemployment
15 is a component of this economy. There is a high rate
16 of unemployment, where young people leave school and
17 say "What's the sense, we can't get jobs." You can pick up
18 any newspaper, not a textbook on economy to know that.
19 It is a problem the government is trying to face. And I
20 asked your Honor not to consider that. However, he is
21 working as a grocery clerk. His wife works, or common law
22 wife works. I don't want to go into the marital relationship.
23 I can say that they went to Florida, they registered as
24 husband and wife, they were automatically married. I
25 don't think the court will, in this age of Freud, will

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2 recognize that.

3 I ask your Honor not to send him to jail.
4 His record consists of a few gambling convictions, mis-
5 demeanors in the state courts. And I want to point out
6 to your Honor that in "high crime areas" or high areas
7 of unemployment, and I read this in the textbook on
8 criminology, sometimes like crime, and it is a numbers
9 game, gambling alleviates some of the effects of unemployment
10 Sometimes these people have to get into that because
11 they are unemployed, because they have nothing worthwhile
12 to do.

13 That's about all I can say to your Honor. I
14 ask your Honor not to impose a jail sentence. I personally
15 don't see what jail does. Perhaps the U.S. Attorney
16 will say that we have to teach people a lesson.

17 Your Honor, for thousands of years people have
18 been put in jail and frankly speaking all I read about
19 is how the crime rate is increasing. I don't know what
20 should be done with these people. This is not a crime
21 of violence, not a crime where my client made money. It is
22 not a crime where he got any advantage. I ask your Honor
23 not to impose a jail term on him. He is the support
24 of these children. They are not all his children, as the
25 Probation report states. His first marriage ended in a

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2 tragedy, where his wife committed suicide in a most
3 horrible way.

4 I don't know what his future is. I don't know
5 what the future is for myself to tell you the truth. But
6 every time I come to these things I feel I am making
7 a gesture in futility. I just don't know what the solution
8 is. In every crime committed there are social factors.
9 In this case I want to urge, at the risk of being a bore,
10 he did not make any money at this. This is not the kind of
11 crime where there was self gain. He did not exploit
12 anybody. If the government feels it was taken advantage
13 of, well, Judge, as I said, this is part of a tradition
14 in this society. That's all I can say for him.

15 THE COURT: All right, Mr. Morales, anything
16 you would like to say to me?

17 THE DEFENDANT: No, sir.

18 THE COURT: Mr. Sudler.

19 MR. SUDLER: Yes, your Honor, just a few words.
20 I did appear before your Honor briefly on another case involv
21 ing a similar charge. That was a situation where an
22 individual refused to testify at a trial, not at a grand
23 jury. That case came before your Honor on a writ of habeas
24 corpus and the issue was whether or not to allow him on bail.
25 The only reason I am bringing that up is to apprise your

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2 Honor that also a rash, there is an epidemic of this crime
3 going on in the Southern District of New York. What it
4 does is it threatens the entire administration of justice.
5 It is people such as Mr. Morales who shield higher-ups.
6 Normally these types of crimes occur in organized crime
7 context. Whether or not these people are shield higher-ups
8 because of fear or to curry favor or for money, we don't
9 know. And I don't know in this situation because I wasn't
10 handling this case. I'm merely filling in for Mr.
11 McCarthy who is on vacation. I don't want to impart to your
12 Honor the sense of urgency the government feels about
13 these types of cases like this are allowed to go unpunished,
14 we may as well shut down the criminal justice system.
15 Not that the system is working so well at present, in its
16 present form, but at least it does work.

17 If the situation is such as contempt in a grand
18 jury are allowed to continue, they are going to entirely
19 thwart the administration of justice. We are not going
20 to ever be able to adduce evidence of crimes, and crime
21 is going to become more of an epidemic and plague on our
22 society than it already is.

23 The only other thing I would like to say is that
24 this crime is a little bit different in that it is not
25 something where the crime is committed and then a person is

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2 caught afterwards. It is something that a person makes
3 a conscious decision at the time that he is going to do.
4 This defendant consciously had to decide that he was not
5 going to testify in the grand jury even if given immunity
6 and then he had to adhere to that. That takes this case out
7 of the realm of any kind of mitigating circumstance, because
8 you have a situation where even to this day the defendant
9 has persisted in his refusal to testify and to give
10 evidence. And without that evidence the government cannot
11 prosecute cases.

12 That's the issue that's involved. Quite
13 frankly, it is far greater than Mr. Morales or this
14 defendant or this case. The principle that is involved
15 is great. Therefore, we urge that your Honor impose
16 a substantial period of incarceration.

17 MR. WALLACH: May I be heard briefly, your Honor?

18 THE COURT: Yes.

19 MR. WALLACH: I have heard that argument many
20 times and I have even read where that argument was made
21 in the United States Supreme Court. I don't remember
22 the case, but during colloquy the solicitor general pointed
23 out to Justice Douglas that this court is making it im-
24 possible to get criminals. Justice Douglas said "What
25 do you think the Bill of Rights was enacted for?"

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2 Then an argument was made to Justice Black
3 about immunity and how there are immunity statutes here
4 and the Fifth Amendment therefore is irrelevant. Justice
5 Black said "If you don't like the Fifth Amendment, amend
6 the Constitution."

7 I don't want to be practical and say that
8 Salerno was indicted anyway. I want to point out, to you
9 that I don't think that argument presents itself as a
10 paradigm. It is not a model. For instance, I know your
11 Honor has done this. I have seen this. You have encountered
12 applications for the most intrusive form of investigation,
13 electronic surveillance. They say we can't get to use any
14 other methods because people won't go before grand juries.
15 They are frightened. We need electronic surveillance. The
16 lawyer gets up and said they could have used less drastic
17 methods.

18 I don't understand where the government
19 says we have to teach people a lesson. How many people are
20 held in contempt and people have knowledge of that and
21 still won't cooperate with the grand jury? They passed
22 an immunity statute which went to the United States Supreme
23 Court, where the case sustained, and nevertheless, your
24 Honor, there is still a decision like Counselman v.
25 Hitchcock, where it says if it doesn't give you transaction

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2 immunity it does not comply with that square or obviate
3 the Fifth Amendment. Justice Goldberg said in *Murphy v.*
4 *The Waterfront Commission* it is a dilemma. You are held
5 in contempt if you testify falsely, you are held in
6 contempt if you don't testify, and so on. I don't see how
7 the U.S. Attorney can say make an example of Morales.
8 Who will profit by this example, your Honor? If people
9 are not going to talk, they are not going to talk
10 because of their conscience. That's why. If they are not
11 going to talk because they have been threatened, they
12 will get up and say that I have been threatened. The circuit
13 said that's not a valid defense because the government will
14 protect you. They have a program for that. I don't under-
15 stand the government even wanting jail in a case like this.
16 If it makes it harder for them, and I say this with respect,
17 not for your Honor and I am not trying to be patronizing
18 or sychophantic. I say this with respect for the whole
19 system: I don't think they have given immunity. I believe
20 firmly in the Bill of Rights, and this whole business of
21 giving immunity and say we won't use it against you, but
22 if we have an independent source we will go after you.
23 I go by the Bill of Rights. I don't believe, of all the
24 offenses I have ever come across, calling a person up
25 and saying you testify or go to jail, frankly I think

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2 it is cruel and inhuman punishment. I think it is making
3 a person, just taking his insides out and mangling them.
4 People just don't --if they don't want to cooperate, they
5 are not going to. If the government says well, teach other
6 people a lesson. I know what's going to happen, and I
7 have seen it happen. It happened to one client of mine.
8 Some of these people will not listen to a lawyer who
9 tells him that you have to make a decision. You go in and
10 cooperate, but if you cooperate you tell the truth.
11 Perjury is a terrible crime. What do these people do?
12 They go in and, sure enough, false declarations. I have seen
13 that happen. There are thousands of cases in this court,
14 thousands of the circuit has heard on this very point.
15 I have seen it in the state courts. But a man takes a stand
16 and say I face jail, civil contempt, criminal contempt,
17 I won't talk. Your Honor, I just don't understand the
18 government's argument. I think it is cruel. That's all
19 I can say about it.

20 I don't think he wants to say anything. I will
21 acknowledge your Honor afforded the defendant an opportunity
22 under Rule 11.

23 Do you want to say anything?

24 THE DEFENDANT: No.

25 THE COURT: All right, Mr. Wallach, thank you.

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2 Mr. Morales, I understand the arguments your counsel
3 has been making. It seems to me, however, what he is
4 suggesting is we ought to have different rules. I have
5 to go by the law as I understand it.

6 I am going to sentence you, Mr. Morales, to
7 six months in jail.

8 Mr. Wallach.

9 MR. WALLACH: Your Honor, can I ask you to
10 continue him on bail. He has \$2,000 cash which was
11 deposited in this court. There was a few hours delay
12 due to me, and \$10,000 personal recognizance bond. I
13 will say this to your Honor, and I say this again with
14 the greatest respect, your Honor, to the office you hold:
15 Of course on an appeal this is the one type of offense
16 that you can argue up there successfully. I don't know
17 how successful he will be. I ask you to keep him on bail.

18 THE COURT: You mean pending an appeal?

19 MR. WALLACH: Yes.

20 MR. SUDLER: We will ask the defendant be
21 remanded at this time, not on the grounds there is a risk
22 of flight, but on the grounds any appeal he can take could
23 only be taken for purposes of delay. These cases are very
24 simple. The issues are very simple and I think that any
25 appeal that would be taken --

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2 THE COURT: I won't grant your application,
3 Mr. Wallach. If you want a day or two for him to report,
4 that's all right.

5 MR. WALLACH: I plan to go away on vacation
6 Friday. Can I briefly just review the various stages
7 of my representation, the issues that were raised? He said
8 the appeal is frivolous. Can I mention to your Honor
9 all the motions that were made here why I think they are
10 appealable?

11 THE COURT: I think I have them in mind.

12 MR. WALLACH: The only problem is I am going
13 away Friday. I go away every September. I have illness
14 in my family.

15 THE COURT: I am not sure I understand what your
16 point is.

17 MR. WALLACH: If bail were continued the appeal
18 would be timely. What is to be gained by keeping him in
19 jail because of me?

20 THE COURT: I say I will not grant your application
21 on that. I will give Mr. Morales 24 hours or more
22 to report, if that's what you had in mind.

23 MR. WALLACH: Can I have until Monday? I will
24 get another lawyer to make a motion for a stay up in
25 the Court of Appeals.

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2 THE COURT: Is that all right with you, Mr. Sudler?

3 MR. SUDLER: Yes, your Honor. We will consent
4 to Mr. Morales surrendering at 10 o'clock Monday morning,
5 unless the Second Circuit stays your Honor's decision,
6 which I can't see any basis for.

7 THE COURT: All right.

8 Then, Mr. Morales, you are to report to room 506 for
9 surrender.

10 MR. WALLACH: I won't be here and I have to get
11 another lawyer.

12 THE COURT: Tuesday morning, 10 o'clock, room 506.

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AFFIDAVIT OF PERSONAL SERVICE

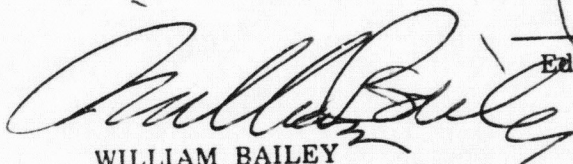
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 8 day of Sept. ,19 77 at No. 1 St. Andrews Pl., NYC

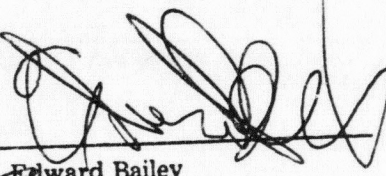
deponent served the within Appendix
upon U.S. Atty. So. Dist. of NY

the Appellee herein, by delivering1 true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
8 day of Sept. 1977.



WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978



Edward Bailey

BEST COPY AVAILABLE

